(16)

No. 98-436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1998
CERTIORARI GRANTED NOVEMBER 9, 1998

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for certiorari. They are incorporated herein by reference.

SUPERIOR COURT
STATE OF MAINE
CUMBERLAND COUNTY

Docket No. CV96-751

JOHN H. ALDEN, *et al.*

vs.

STATE OF MAINE

DOCKET ENTRIES

Date	PROCEEDINGS
1996	
Aug. 01	Received 07-31-96: Complaint filed.
Aug. 30	Received 08-30-96: Plaintiffs' Amended Complaint with Exhibit 1, filed.
Sept. 12	Received 09-12-96: Defendant's Employee's Consent of the Fair Labor Standards Act filed.
Sep. 16	Received 09-16-96: Entry of Appearance of Timothy L. Belcher, Maine State Employees Association, Co-Counsel, Attorneys Donald F. Fontaine and Kaighn Smith, Jr. filed.
Sept. 27	Received 09-27-96: Defendant's Answer filed.
" "	Summons filed. Defendant State of Maine served on 9-20-96.
Oct. 15	Received 10-15-96. Plaintiff's Case File Notice and Pretrial Scheduling Statement filed.
" "	Plaintiff's $300.00 jury fee paid filed.
Nov. 18	Received 11-15-96. Regular Pretrial List Order filed. (Bradford, J.) Order filed. Case to proceed in accordance with Rule 16(d), M.R.Civ.P. Discov-

Date	PROCEEDINGS
1996	
	ery to be completed by Sept. 30, 1997. Plaintiff to designate expert witnesses by April 11, 1997. Plaintiff ti file pretrial memorandum no later than Sept. 30, 1997. By Order to the presiding justice, the Regular Pretrial List Order is incorportaed by reference in the docket.
" "	11-18-97 mailed copy to Donald Fontaine and Peter Brann, Esqs.
Dec. 2	Received 12-2-96. Plaintiff's Notification of Discovery Service filed. Plaintiffs' First Set of Interrogatories to Defendant Concerning Defendant's Affirmative Defenses served on Peter J. Brann, Esq. on 11-27-96.
Dec. 13	Received 12-13-96: Plaintiffs' Motion to Amend Complaint with Incorporated Memorandum of Law filed.
" "	Plaintiffs' Request for Hearing filed.
" "	Plaintiffs' Second Amended Complaint with Exhibit A filed.
Dec. 18	Received 12-18-96: Defendant, State of Maine's Answer to Second Amended Complaint filed.
Dec. 18	Received 12-18-96. Order filed. (Calkins, J.) The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Second Amended Complaint shall govern further proceedings in this matter.
" "	12-18-96 mailed copy to Kaighn Smith and Peter Brann, Esqs. and to Donald F. Fontaine, Esq.
Dec. 23	Received 12-23-96: Plaintiffs' Motion to Dismiss Certain Affirmative Defenses with Incorporated Memorandum of Law with Exhibits A and B filed.
Dec. 23	Received 12-23-96: Plaintiffs' Request for Hearing On Motion to Dismiss Certain Affirmative Defenses filed.

Date	PROCEEDINGS
1997	
Jan. 13	Received 01-13-97: Defendant's Motion for Enlargement of Time filed.
Jan. 16	Received 01/16/97: Plaintiff's Notification of Discovery Service filed. Defendant' response to Plaintiff's interrogatories served on Kaighn Smith on 01/14/97.
Jan. 27	Received 01/27/97: Defendant's second unopposed motion for enlargement of time filed.
Jan. 28	On 01-28-97: As to Defendant's Second Unopposed Motion for Enlargement of Time; Time enlarged by one week for defendant to file opposition to plaintiff's motion to strike. (Calkins, J.) On 01-28-97: Copy mailed to Peter Brann, AAG, Timothy Belcher and Donald Fontaine, Esqs.
Feb. 04	Received 02/03/97: Defendant's Motion for Judgment on the Pleadings filed.
" "	Defendant's Brief in Support of its Motion for Judgment and in Opposition to Plaintiffs' Motion to Strike Affirmative Defenses filed.
Feb. 13	Received 02-12-97: Plaintiffs' Motion for Extension of Time to File Consolidated Opposition to Defendant's Motion for Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion to Strike Affirmative Defenses (Unopposed) filed.
" "	Plaintiffs' Request for Hearing on Motion filed.
Feb. 14	Received 02-13-97. Order filed. (Calkins, J.) Plaintiff's shall have until March 10, 1997, to file their Consolidated to Defendant' Motion for Judgment on the Pleading and Reply to Defendant's Opposition to Plaintiff's Motion to Strike Affirmative Defenses.

Date	PROCEEDINGS
1997	
" "	02-14-97 mailed copies to Kaighn Smith, Timothy Belcher and Peter Brann, Esqs.
Mar. 10	Received 03/10/97: Motion of Cynthia A. Metzler, Acting Secretary of the United States Department of Labor, For Leave to File Brief As Amicus Curiae filed.
" "	Acting Secretary of Labor's Request for Expedited Hearing on Motion filed.
Mar. 11	Received 03/10/97: Plaintiff's Consolidated Opposition to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss Certain Affirmative Defenses with Exhibit 1 filed.
Mar. 13	Received 03/13/97: Letter from Kaighn Smith Jr. regarding corrections to Plaintiff's Consolidated Opposition to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss Certain Affirmative Defenses dated 03/10/97 filed.
Mar. 31	Received 03-31-97. Order filed. (Calkins, J.) The motion of United States Dept. of Labor (USDOL) to file a brief as amicus curiae in this matter is hereby GRANTED without opposition. On agreement of all parties, the USDOL shall file its brief as amicus curiae on or before April 7, 1997. The pending moitons shall be set for oral argument by the clerk. Pursuant to M.R.CIV.P.79(a), this Order may be incorporated by reference into the docket.
" "	03-31-97 mailed copy to Kaighn Smith, Jr. and Peter Brann, Esqs. and to Timothy L. Belcher, Esq.
" "	Received 03-31-97. Plaintiff's Motion to Amend Complaint with Incorporated Memorandum of Law filed.

Date	PROCEEDINGS
1997	
Mar. 31	Received 03-31-97. Plaintiff' Request for Hearing on Motion to Amend Complaint filed. Plaintiff's Third Amended Complaint filed.
Apr. 1	Received 4-1-97. Order filed. (Calkins, J.) The plaintiffs' motion to amend complaint is hereby granted. The plaintiffs' third amended complaint shall govern further proceedings in this matter. 4-1-97 copy mailed to Donald Fonataine, Timothy Belcher and Peter Brann, Esqs.
Apr. 02	Received 04/02/97: Plaintiff's Motion to Extend Time for Designation of Experts (Unopposed) with attachments filed.
" "	Request for Hearing filed.
Apr. 04	Received 04-04-97. Order filed. (Calkins, J.) The Plaintiffs' Motion for Extension of Time to Designate Experts in this matter is hereby GRANTED. Plaintiffs shall have until on or before June 11, 1997, to designate expert witnesses.
" "	04-04-97 mailed copy to Kaighn Smith, Timothy L. Belcher, Esq. and Peter Brann, AAG.
Apr. 7	Received 4-7-97. Acting Secretary of Labor as Amicus Curiae's Brief filed. (Copy of same filed)
Apr. 29	Received 04-28-97. Defendant's Reply Brief on its Motion for Motion for Judgment on the Pleadings filed.
May 13	Received 05-13-97. Defendant, Alixis M. Herman, Secretary of the United States Department of Labor's Motion for Leave to Participate in Oral Argument on Pending Motions filed.
" "	Secretary of Labor's Request for Expedited hearing on Motion filed.

Date	PROCEEDINGS
1997	
May 16	Received 05-16-97. Letter from Kaighn Smith, Jr., Esq. regarding Plaintiff does not oppose to the Motion of Alexis Herman's filed.
May 20	Received 05-19-97. Defendant's Answer to Third Amended Complaint filed.
" "	Defendant's Objection to Secretary's Motion for Leave to Participate in Oral Argument filed.
June 4	Received 06-03-97. Order filed. (Calkins, J.) It is hereby ORDERED, that counsel for the Secretary of the United States Department of Labor is granted ten minutes to participate in oral arguments on pending motions regarding sovereign immunity and the FLSA state of limitations.
" "	06-04-97 mailed copy to Kaighn Smith, Timothy Belcher, Peter Brann and Ellen L. Beard, Esqs.
June 6	Received 6-5-97. Defendant's Supplemental Brief on Sovereign Immunity with Exhibit A & B filed.
" "	Letter from Peter Brann, AAG regarding scheduling on 6-16-97.
" "	Received 6-6-97. Corrected Defendant's Supplemental Brief on Sovereign Immunity with Exhibit A & B filed.
June 19	On 06-16-97. Hearing held on Plaintiff's Motion to Dismiss, Defendant's Motion for Judgment on the Pleadings, Sovereign Immunity and Course of Future Proceedings. Court takes all matters under advisement. Calkens, J. Presiding. Timothy Thompson, Court Reporter.
July 22	Received 07-21-97. Decision and Order filed. (Calkins, J.) "JUDGMENT" The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

Date	PROCEEDINGS
1997	
" "	07-22-97 mailed copy to Kaighn Smith, Timothy Belcher and Peter Brann, Esqs.
Aug. 07	Received 08-06-97. Plaintiff's Notice of Appeal from the Judgment entered on July 22, 1997 filed.
" "	Plaintiff's Certificate Regarding Transcript filed.
" "	Plaintiff's Statement of the Issue of Appeal filed.
" "	Plaintiff's Appeal fee NOT PAID.
" "	On 08-07-97. Copies of the Docket Entries and Notice of Appeal sent to Timothy Thompson, Court Reporter.
" "	On 08-07-97. Attested copies of the Docket Entries and Notice of Appeal given to the Clerk of the Law Court on this date.
" "	On 08-07-97. Copy given to Justice Calkins in Cumberland County.
" "	On 08-07-97 mailed copy to Timothy L. Belcher and Peter Brann, Esqs.
Aug. 15	Received 08-14-97: Plaintiff's Appeal of $100.00 PAID. Attested Copy of Docket Sheet given to the Clerk of the Law Court on this date.
Aug 27	On 08-27-97. Complete file transmitted to the Clerk of the Law Court on this date.
" "	On 08-27-97. Copies of the "Law" Index, Exhibit Transmission Sheet and Docket Entries mailed to Donald Fonataine, Timothy Belcher and Peter Brann, Esqs.

SUPREME JUDICIAL COURT
OF MAINE

CUM-97-446

JOHN H. ALDEN, *et al.*

v.

STATE OF MAINE

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1997	
8/7/97	Notice of Appeal filed
10/7/97	Appellants' Brief filed
11/24/97	Appellee's Brief filed
11/24/97	Amicus Brief of United States filed
12/8/97	Appellants' Reply Brief filed
12/8/97	Appellee's Brief filed
1998	
8/4/98	Opinion filed

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. ——— CV-96-751

J. H. ALDEN, *et als.*,
Plaintiffs

v.

STATE OF MAINE,
Defendant

COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Elizabeth A. Buxton, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, David Eldridge, Scott R. Erickson, Timothy G. Farr, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Normand W. Guay, Alan Hybers, Pauline A. Gudas, Alexandria M. Helms, William W. Jackson, William Jones, John H. Lorenzen, Roman J. Maxsimic, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Steven J. Onacki, J. Charles O'Roak, Susan Priest Pierce, Lewis W. Randall, Michael K. Roach, Alison B. Smith, David L. Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts and Corinne Zipps, and state for their complaint against the State of Maine as follows:

1. Plaintiffs bring this action to recover from Defendant unpaid overtime compensation and an additional amount as liquidated damages, pursuant to 29 U.S.C.

§ 201 et seq. (the Fair Labor Standards Act), as more fully set forth herein.

2. Plaintiffs reside in various counties including Cumberland County, State of Maine.

3. At all material times herein they were employed by Defendant, State of Maine, as Probation Officers, Probation & Parole Officers, Juvenile Caseworkers and/or Probation & Parole Officers II in this action.

4. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. § 203(d).

5. At all material times herein Plaintiffs worked more than forty (40) hours per week in their employment for Defendant, and Defendant failed to compensate Plaintiffs for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

6. Defendant has repeatedly, intentionally, and willfully violated the provisions of 29 U.S.C. § 201 et. seq. by employing Plaintiffs for work weeks longer than forty (40) hours without compensating them for said employment in excess of forty (40) hours in said work weeks, at rates not less than one and one-half times the regular rate at which they were employed.

WHEREFORE, Plaintiff prays this Court:

a. enter judgment for the Plaintiffs and against the Defendant on the basis of the Defendants' willful violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.;

b. award Plaintiffs actual and compensatory damages in the amount shown to be due for unpaid minimum wages and overtime compensation, with interest;

c. award Plaintiff an equal amount in liquidated damages;

d. award Plaintiff reasonable attorney's fees and cost of suit;

e. grant such other relief as this Court deems equitable and just.

Dated: 7/31/96

/s/ Donald F. Fontaine
DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
Counsel for Plaintiffs

FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879

SUPERIOR COURT

[Caption Omitted]

AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greaton Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.[1] Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer,

[1] The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

> I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the 3 years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plantiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSIONS FROM COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classification from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications included Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: August 30, 1996

/s/ [Illegible]
DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879

Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

DEFENDANT'S ANSWER

The defendant, State of Maine, respond to the plaintiffs' amended complaint dated August 30, 1996 ("complaint"), by and through their counsel, on information and belief, as follows:

ANSWER

1. The defendant admits that the plaintiffs assert that the defendant violated the Fair Labor Standards Act ("FLSA"), but otherwise deny the allegations of this paragraph of the complaint.

2. The defendant admits that the plaintiffs previously filed suit against the defendant in federal court, admits that the federal court dismissed that action for lack of subject matter jurisdiction, but otherwise deny the allegations of this paragraph of the complaint.

3. The defendant admits that the plaintiffs are or were employed as Probation Officer, Probation & Parole Officer, Juvenile Caseworker, and Probation & Parole Officer II, but otherwise deny the allegations of this paragraph of the complaint.

4. The defendant does not respond to this paragraph of the complaint because the referenced documents speak for themselves.

5. The defendant denies the allegations of this paragraph of the complaint.

6. The defendant repeats and realleges its responses to the allegations of the referenced paragraphs of the complaint.

7. The defendant denies the allegations of this paragraph of the complaint.

8. The defendant denies the allegations of this paragraph of the complaint.

9. The defendant denies the allegations of this paragraph of the complaint.

10. The defendant denies the allegations of this paragraph of the complaint.

11. The defendant denies the allegations of this paragraph of the complaint.

AFFIRMATIVE DEFENSES

Expressly reserving the right to amend and/or supplement the defenses set forth below, and reserving and not waiving all defenses, the defendant asserts at this time the following defenses to the complaint:

FIRST DEFENSE

12. The plaintiffs have failed to state a claim against the defendant upon which relief may be granted.

SECOND DEFENSE

13. The plaintiffs' claims against the defendant are barred by the doctrine of sovereign immunity.

THIRD DEFENSE

14. The plaintiffs' claims against the defendant are barred by the applicable statutes of limitation and by the doctrine of laches.

FOURTH DEFENSE

15. The plaintiffs' claims against the defendant are barred by the doctrines of waiver, estoppel, and unclean hands.

FIFTH DEFENSE

16. The plaintiffs' claims against the defendant are barred by the doctrines of release and accord and satisfaction.

SIXTH DEFENSE

17. The plaintiffs' claims against the defendant are barred by the Portal to Portal Act, as amended.

SEVENTH DEFENSE

18. The plaintiffs' claims against the defendant are barred by the terms of the collective bargaining agreement.

EIGHTH DEFENSE

19. The plaintiffs' claims against the defendant are barred by the exemptions contained in the FLSA, including the law enforcement and professional exemptions.

NINTH DEFENSE

20. The plaintiffs' claims against the defendants are barred by the doctrine of *de minimus* overtime contained in the FLSA.

TENTH DEFENSE

21. The plaintiffs' claims against the defendant are barred by the doctrines of *res judicata*, collateral estoppel, claim preclusion, and issue preclusion.

ELEVENTH DEFENSE

22. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, the plaintiffs were properly compensated under the terms of the collective bargaining agreement, and are not entitled to any additional compensation.

TWELFTH DEFENSE

23. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, it was in violation of

the defendant's policies and practices, and without the knowledge and consent of the defendant, and are not entitled to any additional compensation.

THIRTEENTH DEFENSE

24. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, the plaintiffs' claims against the defendant are subject to offset based on payments and compensatory time off provided by the defendant to the plaintiffs.

CONCLUSION

Wherefore, the defendant demands judgment dismissing the complaint with prejudice in its entirety against and in favor of it, awarding it its cost and attorneys' fees, and awarding such other and further relief as the court may deem appropriate and necessary under the circumstances.

Dated: September 26, 1996
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ P. J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333
(207) 626-8800

Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

SECOND AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greaton Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Suasn P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.[1] Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer,

---

[1] The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

> I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the 3 years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSIONS FROM COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications included Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: 12/11/96

/s/ [Illegible]
DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

DEFENDANT'S ANSWER TO SECOND AMENDED COMPLAINT

Pursuant to Rule 10(c) of the Maine Rules of Civil Procedure, the defendant, State of Maine, answers the Plaintiffs' Second Amended Complaint dated December 11, 1996, by adopting by reference the Defendant's Answer to Amended Complaint, dated September 26, 1996.

Dated: December 16, 1996
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ P. J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800

Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Second Amended Complaint shall govern further proceedings in this matter.

Dated: 12/18/96

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

PLAINTIFFS' MOTION TO DISMISS CERTAIN AFFIRMATIVE DEFENSES WITH INCORPORATED MEMORANDUM OF LAW

The Plaintiffs in this matter, through counsel, hereby move to dismiss Defendant's Second Affirmative Defense that Plaintiffs' claims are barred by the doctrine of sovereign immunity and its Third Affirmative Defense that their claims are barred by the statute of limitations.

I. BACKGROUND

This is an action for unpaid overtime wages withheld from Plaintiffs by the State of Maine, their employer, dating back to December 21, 1989. *See Second Amended Complaint* at ¶¶ 2, 3. Plaintiffs assert claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"). Plaintiffs previously filed their claims in the United States District Court for the District of Maine on December 18, 1992 in an action captioned *Jon Mills, et al. v. State of Maine* (D.Me. Civil Action No. 92-0410-P-H) (*"Mills"*). A true and accurate copy of that Complaint is attached hereto as Exhibit A.[1] Thereafter, pursuant to dispositive motions, Plaintiffs prevailed on their liability claims. The U.S. District Court appointed a Special Master to report on the proper measure of damages. Before determination of the award of damages, however, the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). As a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction because of the state's immunity

[1] Certain Plaintiffs filed an Amended Complaint in the federal court on May 18, 1993.

from suit in federal court under the Eleventh Amendment. The U.S. District Court's order of dismissal in *Mills* is attached hereto as Exhibit B.

Plaintiffs then filed their identical claims in this court on July 31, 1996.[2] Defendant now asserts that the Plaintiffs claims are barred by the "doctrine of sovereign immunity" and by the "statute of limitations."

II. THE STATE CANNOT ASSERT THE DOCTRINE OF SOVEREIGN IMMUNITY AS A DEFENSE IN THIS CASE

Articlie VI of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Supreme Court has ruled that when "a federal statute . . . impose[s] liability upon the States, the Supremacy Clause makes that statute the law in every State fully enforceable in state court." *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207, 112 S.Ct. 560, 566 (1991). This holding applies despite the Eleventh Amendment's prohibtion on suing a state in federal court, as the Eleventh Amendment has no applicability to state courts.[3]

[2] Plaintiffs' Amended Complaint was filed August 30, 1996, prior to Defendant's Answer. Three additional Plaintiffs, Martha Jo Nichols, Donald P. Parsley, and Donna M. Miles joined this case with claims identical to those that they had with the others in the *Miles* case pursuant to the Second Amended Complaint, filed December 11, 1996. The Plaintiffs' motion to file the Second Amended Complaint was granted on December 18, 1996.

[3] For an extended explanation of the supremacy of federal law, see *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S.Ct. 2430, 2438-42 (1990).

It is well-established that Congress intended to abrogate the sovereign immunity of the states in FLSA. *E.g. Brinkman v. Department of Corrections of State of Kansas*, 21 F.3d 370 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994) (allowing suit by employees against state and state agencies); *Jacobs v. College of William and Mary*, 495 F. Supp. 183 (D.Va.), *aff'd* 661, F.2d 922, *cert. denied*, 454 U.S. 1033 (1980) (same); *Brennan v. State of Iowa*, 494 F.2d 100 (8th Cir.), *cert. denied*, 421 U.S. 1015 (1974) allowing suit by United States against state); *Dunlop v. State of R.I.*, 398 F.Supp. 1269 (D.R.I. 1975) (same). State courts routinely entertain such actions. *See, e.g., Tefft v. Montana*, 894 P.2d 317 (Mont. 1995); *Laurence v. Colorado*, 910 P.2d 73 (Colo. Ct. App. 1995); *Forry v. Department of Natural Resources*, 889 S.W.2d 838 (Mo. Ct. App. 1994); *Casserly v. Colorado*, 844 P.2d 1275 (Col. Ct. App. 1992).

In sum, it is clear that Congress abrogated the states' sovereign immunity to suit under FLSA, making the state employers liable in state court for failing to pay overtime wages as required by federal law. Congress has the power to do so under the Supremacy Clause of the United States Constitution. The State's asserted defense of sovereign immunity is therefore without merit.

III. PLAINTIFFS' CLAIMS FOR REMEDIES UNDER THE FLSA, DATING BACK TO THREE YEARS PRIOR TO THE FILING OF THEIR IDENTICAL CLAIMS IN THE *MILLS* CASE ARE NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT WAS TOLLED DURING THE PENDENCY OF THE *MILLS* CASE.

Plaintiffs' claims for violations of the FLSA may be brought within three years of the State's violations. 29 U.S.C. § 255. In *Mills*, Plaintiffs brought their claims against the State for violations extending 3 years prior to

the date of the filing of that action, December 21, 1989. *See* Exhibit A at 1, 5 (page 1 stamp-dated filed in U.S. District Court on 12/21/89, page 5, claiming FLSA remedies for 3 years prior to filing). Defendants cannot now claim that Plaintiffs claims are time-barred. The pendency of Plaintiffs' identical claims in federal court tolls the running of the statute of limitations in the instant case.

The Supreme Court addressed a similar situation in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 85 S.Ct. 1050 (1965). In *Burnett*, an employee filed an action under the Federal Employers' Liability Act (FELA) in an Ohio state court. Although FELA actions may be brought in state or federal courts, the Ohio court dismissed the case because venue was improper. The plaintiff refiled the case in federal court eight days after the state court dismissal, but the district court dismissed the action because it was filed in that court more than three years (the applicable statute of limitations) after the action accrued. The Supreme Court reversed and held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." 380 U.S. at 428, 85 S.Ct. at 1054. Applying the doctrine of equitable tolling, the Court refused to elevate form over substance and held that the purpose of the statute of limitation was fulfilled because the Defendant was clearly on notice of the Plaintiffs claims. *See id.* at 1054. *See also Chevron Oil Co. v. Huson*, 92 S.Ct. 349 (1956) (applying equitable tolling principle in refusing to dismiss as untimely a case, filed over one year after cause of action accrued, when the case was filed before a decision holding that the applicable statute of limitations was one year).

Numerous state courts similarly apply equitable tolling principles when there is plainly no prejudice to the defend-

ant in circumstances identical to the instant case. *E.g. Addison v. State*, 578 P.2d 941 (Cal. 1978) (tort claim that was timely filed in federal court stays statute of limitations for a subsequent filing; federal court dismissed for lack of jurisdiction); *Galligan v. Westfield Centre Service, Inc.*, 412 A.2d 122 (N.J. 1980) (same); *Torres v. Parkview Foods*, 468 N.E.2d 580, 583 (Ind.App. 1984) ("when in good faith a plaintiff brings an action in federal court within the statute of limitations, but it fails for lack of diversity jurisdiction, the statute of limitations is tolled with the filing of the suit for purposes of determining whether a subsequent state action involving the same parties and the same claims is brought within the statute of limitations").

In applying the doctrine of equitable tolling, Courts consider timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. *See, e.g., Addison*, 578 P.2d at 943-44; *Galligan*, 412 A.2d at 125. These elements are clearly met in the present case. Plaintiffs filed timely claims against the Defendant in federal court on December 21, 1991, won their liability case, proceeded to a Special Master for their appropriate relief and then faced dismissal for want of jurisdiction by the Supreme Court's decision in *Seminole*, which reversed earlier precedent. *See* Exhibit B. Plaintiffs then brought their identical claims in this Court.

On December 21, 1991, Defendant had timely notice of Plaintiffs' claims for overtime wages and other remedies under the FLSA for the preceding 3 years. Plaintiffs now bring the same claims in this Court in full good faith to obtain their rightful relief after the unanticipated dismissal of their case for lack of jurisdiction in federal court. The doctrine of equitable tolling applies directly to this situation. Thus, Defendants cannot assert that Plaintiffs' claims are now time-barred by the applicable FLSA three year statute of limitations.

IV. CONCLUSION

For all of the above reasons, Defendant's Second Affirmative Defense that Plaintiffs' claims are barred by the doctrine of sovereign immunity and its Third Affirmative Defense that their claims are barred by the statute of limitations must be dismissed.

Dated: 12/18/96

/s/ Kaighn Smith, Jr.
KAIGHN SMITH, JR., ESQ.
DONALD F. FONTAINE
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

92-410-P-H

JON MILLS, JOHN H. ALDEN, WALTER ANDERSON, CYNTHIA AYER, DAVID BARRETT, DANA J. BLACKIE, GEORGE R. BLACKMAN, DOUGLAS L. BOOTHBY, NANCY L. BOUCHARD, RANDOLPH E. BROWN, ELIZABETH BUXTON, SUSAN CAREY, LEE CARTER, RICHARD CHAREST, CLAIRE CHESLEY, JR., LEO T. COLLINS, DAVID CYR, FRANCIS R. CYR, JOAN DAWSON, PETER J. DEANE, JOSEPH S. DEFILIPP, PATRICK T. DELAHANTY, JOSEPH DENTICO, DANIEL DODGE, MAURA A. DOUGLASS, RAYMOND J. DZIALO, DAVID ELDRIDGE, SCOTT R. ERICKSON, TIMOTHY G. FARR, E. DONALD FINNEGAN, PAULINE N. FLAGG, RICHARD FLANAGAN, WILLIAM D. FRANCIS, LEWIS F. FREY, RICHARD GODIN, PAULINE A. GREATON, SANDRIA J.C. GRIFFIN, NORMAND W. GUAY, ROY C. GUTFINSKI, DANIEL HARFOUSH, KAREN HARTNAGLE, ALEXANDRIA HELMS, ALAN HYBERS, WILLIAM W. JACKSON, BETSY JAEGARMAN, WILLIAM JONES, PAUL KELLY, STEPHEN D. LIBBY, WAYNE LIBBY, JOHN LORENZEN, DARLENE LYNG, LINDA MAHER, RICHARD E. MANNING, GREG MASALSKY, BARBARA MASCETTA, ROMAN MAXSIMIC, MICHAEL O. MCNALLY, TERRY W. MICHAUD, DONNA MILES, MARTHA MILLIMAN-TAKATSU, MERRILEE MONKS-PAINE, MICHAEL R. MORIN, LISA K. NASH, MARTHA JO NICHOLS, DANIEL O'NEILL, CHARLES O'ROAK, DANIEL OUELLETTE, DONALD P. PARSLEY, NANCY PECK, SUSAN PIERCE, LEWIS RANDALL, MICHAEL K. ROACH, RICHARD J. ROBBINS, RONALD M. SAGNER, KEITH L. SAVAGE, ALISON B. SMITH, DAVID L. SNYDER, CHARLES D. STRANDBERG, WAYNE STURDIVANT, ANN T. THERRIEN, MARK

W. WARNER, JOYCE WILLIAMS, ALLEN O. WRIGHT, CORINNE ZIPPS,

Plaintiffs, –

v.

STATE OF MAINE,

Defendant.

COMPLAINT

Plaintiffs as a complaint against Defendant State of Maine allege the following:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. section 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. section 1331 and 29 U.S.C. section 216. Venue properly lies in this Court pursuant to 29 U.S.C. Section 1132 and pursuant to 29 U.S.C. Section 185(a).

PARTIES

3. Plaintiffs are or were employed by Defendant State of Maine as Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week during the past three years.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiffs' consent to be a party in this action.

5. Defendant State of Maine is an employer as that term is used in 29 U.S.C. section 203(d).

FIRST CAUSE OF ACTION
IMPROPER EXCLUSIONS FROM COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant State of Maine has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant State of Maine has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant State of Maine has not compensated these employees in these excluded classifications for hours worked in excess of 40 per week at the rate of one and one-half times their regular rate.

10. The excluded classifications include Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant State of Maine willfully violated 29 U.S.C. section 207.

WHEREFORE Plaintiffs request that this Court grant the following relief:

1. Order Defendant State of Maine to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week during the past three years equal to (a) the number of overtime hours times one and one-half times the employees' regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendants;

3. Grant Plaintiffs the costs of this action, including reasonable attorneys' fees; And

4. Grant such other relief as is just and proper.

Dated: December 18, 1992

Respectfully submitted,

/s/ John R. Lemieux
JOHN R. LEMIEUX, ESQ.
Counsel for Plaintiffs
PO Box 1072, 65 State St.
Augusta, ME 04332-1072
(207) 622-3151

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Caption Omitted]

ORDER

In light of *Seminole Tribe of Fla. v. Florida,* 116 S. Ct. 1114 (1996), it appears that on the eve of final judgment and after years of litigation this Court no longer has federal jurisdiction over the State's violation of federal wage and hour laws. *Accord Adams v. Kansas,* 919 F. Supp. 1496 (D. Kan. 1996); *Moad v. Arkansas State Police Dep't,* No. LR-C-94-450 (E.D. Ark. May 14, 1996); *Raper v. Iowa,* No. 4-94-CV-10237 (S.D. Iowa June 21, 1996). Nor do I have the authority to remand the case to the state courts, because the lawsuit was filed initially in federal court. The plaintiffs' arguments that jurisdiction can be sustained under Section 5 of the Fourteenth Amendment or that the Supreme Court's holding in *Seminole Tribe* on subject matter jurisdiction is prospective only and not applicable to this case are wholly unpersuasive. *See Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 97 (1993). The plaintiffs have likewise failed to make a persuasive case for discovery; there is no reason to conclude that discovery would turn up a consent to jurisdiction or waiver of the Eleventh Amendment.

The plaintiffs' motion to certify the constitutional question to the United States Attorney General under 28 U.S.C. § 2403(a) is GRANTED. *See also* Local Rule 13. The Clerk's Office shall notify the Attorney General that the State's motion to dismiss the complaint has called into question the constitutionality of 29 U.S.C. § 216(b) (Actions to recover for violations of the Fair Labor Standards Act "may be maintained against any employer (including a public agency) in any Federal or State court of com-

petent jurisdiction.") Because the constitutional issue is so clear following the Supreme Court's ruling in *Seminole Tribe,* however, I see no reason to await the outcome of the certification. If there is anything to be done here, it can be pursued on appeal.

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted. *Compare Seminole Tribe* (holding that Congress lacks power) *with Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989) (upholding Congress's power).

Accordingly, the Complaint is DISMISSED for lack of subject matter jurisdiction inasmuch as the State has not waived its Eleventh Amendment rights. The Clerk is directed to certify the constitutional question to the United States Attorney General. So ORDERED.

Dated this 3rd day of July, 1996.

/s/ D. Brock Hornby
D. BROCK HORNBY
United States District Judge

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. CV-96-751

JOHN H. ALDEN, *et al.*,
Plaintiffs,
v.
STATE OF MAINE,
Defendant.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Maaine Rules of Civil Procedure, the defendant, State of Maine, moves for judgment on the pleadings on the grounds that (a) the plaintiffs' claims are barred by the doctrine of sovereign immunity, and (b) the plaintiffs' claims are barred by the statute of limitations.

Wherefore, the defendant requests that its motion for judgment on the pleadings be granted.

Dated: February 3, 1997
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ Peter J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
August, ME 04333-0006
(207) 626-8800
Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

ORDER

Pursuant to the Plaintiffs' unopposed motion, Plaintiffs shall have until March 10, 1997, to file their Consolidated Oppositon to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiffs' Motion to Strike Affirmative Defenses.

Dated 2/13/97

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

ORDER

The motion of the United States Department of Labor (USDOL) to file a brief as *amicus curiae* in this matter is hereby GRANTED without opposition.

On agreement of all parties, the USDOL shall file as *amicus curiae* on or before April 7, 1997. Defendant shall have 21 days from the filing of said brief to file a consolidated Reply Memorandum to the USDOL *amicus* brief and to the Plaintiffs' *Opposition to Defendant's Motion for Judgment on the Pleadings*, previously filed on March 10, 1997. Defendant's Reply Memorandum shall be strictly confined to addressing new matter raised in accordance with M.R.Civ.P. 7(e). Plaintiffs may likewise file a Reply Memorandum to the USDOL *amicus* brief within 21 days of the filing of said brief, which shall likewise be strictly confined to addressing new matter raised in accordance with M.R.Civ.P. 7(e).

The pending motions shall be set for oral argument by Clerk.

SO ORDERED.

Dated: 3/29/97

/s/ Susan Calkins
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

THIRD AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Dana J. Blackie, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greaton Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Linda Maher, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*: the unlawful ex-

clusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.[1] Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

---

[1] The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

> I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the three years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSION FOR COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications including Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classification for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: 3/28/97

/s/ [Illegible]
DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Third Amended Complaint shall govern further proceedings in this matter.

Dated: 4/1/97

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion for Extension of Time to Designate Experts in this matter is hereby GRANTED. Plaintiffs shall have until on or before June 11, 1997, to designate expert witnesses.

Dated: 4/4/97

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

DEFENDANT'S ANSWER TO THIRD AMENDED COMPLAINT

Pursuant to Rule 10(c) of the Maine Rules of Civil Procedure, the defendant, State of Maine, answers the Plaintiffs' Third Amended Complaint dated March 28, 1997, by adopting by reference the Defendant's Answer to the Amended Complaint, dated September 26, 1996.

Dated: May 15, 1997
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ Peter J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800

Attorneys for Defendant

[Caption Omitted]

ORDER

Alexis M. Herman, Secretary of the United States Department of Labor, having moved for leave to participate in oral argument on pending motions, and the parties having received full opportunity to file any objections to this motion, it is hereby

ORDERED, that counsel for the Secretary of the United States Department of Labor is granted ten minutes to participate in oral argument on pending motions regarding sovereign immunity and the FLSA state of limitations.

Dated 6/2/97

/s/ Susan Calkins
HON. SUSAN CALKINS
Justice, Maine Superior Court

[Caption Omitted]

DECISION AND ORDER

The named plaintiffs in this case number approximately 65. They are all employed by the Defendant State of Maine as probation officers and juvenile caseworkers. In this action they allege that Maine owes them money for overtime work for which they should have been paid pursuant to the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 *et seq.*

An identical lawsuit was filed by many of these same plaintiffs in federal court on December 21, 1992. The federal court held that the provisions of FLSA prohibited Maine from excluding the plaintiffs from coverage of FLSA. *Mills v. State of Maine*, 839 F. Supp. 3, 4 (D. Me. 1993). It later held that liquidated damages and back pay for a two year period would be awarded to the plaintiffs. *Mills v. State of Maine*, 853 F. Supp. 551, 555, 556 (D.Me. 1994). The matter was referred to a special master for a determination on the amount of back pay owed to each plaintiff. Both parties filed objections to the master's report. Before a final judgment could be entered by the court, the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) was decided. Relying upon the holding in *Seminole*, the federal court determined that it lacked subject matter jurisdiction because Maine had not waived its Eleventh Amendment Rights.[1] The

[1] *Seminole* involved the Indian Gaming Regulatory Act which required states to negotiate with tribes and authorized suit against the state to compel performances of the state's duty under the Act. The Supreme Court held that "notwithstanding Congress' clear in-

court dismissed the complaint, and the First Circuit affirmed the dismissal. *Mills v. State of Maine*, No. 92-410-P-H, 1996 WL 400410 (D. Me. July 3, 1996), aff'd —— F.3d ——, No. 96-1973, 1997 WL 361186 (1st Cir. July 7, 1997). The First Circuit held that, although Congress expressly intended to abrogate state immunity in FLSA actions in federal court, Congress did not have power to do so under the Commerce Clause, the source of Congress' power to enact FLSA. The court further held that FLSA was not enacted pursuant to section 5 of the Fourteenth Amendment, which is a source of power by which Congress can abrogate sovereign immunity.

While the *Mills* case was pending, pursuant to a collective bargaining agreement, Maine began paying the probation officers and juvenile caseworkers for overtime, as of February 6, 1994.

On July 31, 1996, the plaintiffs filed the instant action. Maine's answer sets forth the affirmative defenses of sovereign immunity and statute of limitations, among others. Plaintiffs brought a motion to dismiss these two defenses, and Maine moved for judgment on the pleadings pursuant to Rule 12(c).

I. Statute of limitations

The statute of limitations for violations of FLSA is two years, unless the violation is willful, in which case the period of limitations is three years 29 U.S.C. § 255. In the federal court action, the plaintiffs sought FLSA remedies for three years prior to the filing of the action which was on December 21, 1992. It is not disputed that Maine has paid overtime to the plaintiffs since February 6, 1994. In this action the plaintiffs are seeking

tent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . ." *Seminole*, 116 S. Ct. at 1119. The Court expressly overturned *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989) which had held that the Commerce Clause gave Congress the power to abrogate State's immunity under the Eleventh Amendment.

damages for the period of December 21, 1989 to February 6, 1994.

Maine argues that the two year period of limitations is applicable and that since this action was not filed until July 31, 1996, which was more than two years after Maine started paying overtime to the plaintiffs, the action must be dismissed. Maine points out that the federal court held that the two year period applied instead of the three year period because the violation was not willful. *Mills*, 853 F. Supp. at 555. The plaintiffs claim that the statute of limitations was tolled during the pendency of their federal action. Both parties acknowledge that federal law on limitations applies in this case because it is a federal statute of limitations that is at issue.

The Supreme Court held that the doctrine of equitable tolling is available in federal cases. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 434-35 (1965). In *Burnett* the plaintiff filed a claim under the Federal Employers' Liability Act (FELA) in state court, but the action was dismissed for improper venue. A few days later the plaintiff filed the same action in federal court, but it was dismissed because the statute of limitations had run. Because the state action had been brought in a timely fashion and because the defendant was not unfairly surprised by the filing of the federal action, equitable tolling was appropriate. The Court held that equitable tolling furthered the policies and remedial purposes of FELA.

Many other federal cases have relied on *Burnett* and applied equitable tolling to a variety of federal limitations statutes including cases in which the defendant is a governmental entity.[2] *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The courts look at whether the doctrine of equitable tolling will effectuate the pur-

[2] For a list of such cases see *Webb v. United States*, 66 F.3d 691, 696 (4th Cir. 1995).

pose of the statutory scheme; whether the plaintiff has been diligent; and whether the defendant will be surprised by the revival of a stale claim.[3] Another factor utilized by the courts in deciding whether to allow equitable tolling is that the first action be filed in a court with apparent jurisdiction.[4]

Relating these factors to the instant case, it is apparent that the doctrine of equitable tolling should be applied. It can hardly be said that equitable tolling would not further the policies and purposes of FLSA which are set forth in 29 U.S.C. § 202. It is a remedial statute designed to correct and eliminate working conditions that are detrimental to he health and well-being of workers. An integral portion of the scheme is the right to collect wages that have been wrongfully withheld. Allowing the plaintiffs to finish in state court what they started to do in federal court furthers the policies of FLSA. Maine cannot claim unfair surprise nor complain about the staleness of the claims. Both parties had been working toward a resolution of each individual plaintiff's claim before the *Seminole* decision forced the federal court to stop the proceedings. Since the date of the filing of the federal suit Maine has been on notice that claims for unpaid overtime were being made. The requirement that the first court have apparent jurisdiction has been met in this case; the *Mills* court had jurisdiction until the decision in *Seminole*.

II. Sovereign Immunity

Maine submits that the doctrine of sovereign immunity bars the plaintiffs from obtaining any monetary damages

[3] Where the plaintiff has been diligent and the defendant has been given notice of the claim, equitable tolling is appropriate. *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129, 1134 (6th Cir. 1989) (allowed equitable tolling when ERISA claim brought in state court).

[4] Filing an action in a court that clearly lacks jurisdiction will not toll the statute of limitations. *Farrell*, 870 F.2d at 1133.

from it. In support of this proposition, Maine relies upon four cases: *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978).

Drake involved payments owed to a nursing home by the Maine Department of Human Services under a federal/state welfare program. The trial court ordered the Department to pay the nursing home, but the Law Court held that sovereign immunity required dismissal of the action.[5] The court held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts. *Drake*, 390 A.2d at 546.

Thiboutot involved benefits under Aid to Families with Dependent Children (AFDC) in which the court determined that the Maine Department of Human Services had violated the federal AFDC statute. The plaintiffs requested retroactive relief. The trial court's decision to deny retroactive benefits to members of the plaintiff class was upheld by the Law Court. Relying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, the Law Court held that state sovereign immunity likewise barred the award of retroactive benefits in state court. *Thiboutot*, 405 A.2d at 236-37.

In *Jackson*, the plaintiff sued the State for violation of his rights under the federal Rehabilitation Act. The trial

[5] The Law Court declined to determine whether dismissal was required because of a lack of jurisdiction or for the absence of a cause of action. *Drake*, 390 at 543.

court ordered the State to pay damages. The Law Court reversed the damages award against the State.

> For reasons similar to those expressed in *Thiboutot*, and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act.

Jackson, 544 A.2d at 298. The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act.

Moody involved the AFDC program and a violation of the due process rights of the plaintiffs by the Maine Department of Human Services. A similar case was brought in the federal court which found that the Department had violated the plaintiffs rights under the AFDC statute. The Department stopped the violation and complied with the federal decision. The trial court in the state action ordered the Department to notify members of the plaintiff class of their rights to certain payments, and the Law Court reversed. Since there was no ongoing violation of the law, the only purpose of the notice was to provide a means for the class members to seek retroactive payments. The Law Court held that an award of retroactive monetary relief was the same as damages to be paid from state funds and was barred by sovereign immunity. In a footnote, the Court stated:

> The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.

Id. at 158, n. 3 (Citations to *Thiboutot* and *Drake* omitted).

In a concurring opinion in *Moody*, Justice Lipez agreed that prior decisions of the Law Court mandated the result, but he found it "difficult to reconcile with the Supremacy Clause of the Federal Constitution." He agreed that the past decisions of the Law Court had relied upon Eleventh Amendment jurisprudence in the development of the sovereign immunity doctrine in Maine. Because the parties had not challenged that reliance, he found the *Moody* case an inappropriate one to examine whether the Eleventh Amendment principles should continue to be incorporated into the state sovereign immunity doctrine.

These four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either.

Eleventh Amendment jurisprudence is the subject of much debate as can be seen from the vigorous dissents in *Seminole*. The majority accepted the historical view that the understanding of the framers of the United States Constitution was that states were immune as sovereigns. When it became apparent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Supreme Court did not share that general understanding, the Eleventh Amendment was quickly adopted. *Seminole*, 116 S.Ct. at 1130. For over a century a majority of the Court has recognized that the intent of the Amendment was broader than its literal meaning, and in interpreting the Amendment, the Court has gone beyond the plain meaning of its words. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Amendment,

as interpreted bars all actions for money damages against states in federal court brought by anyone, unless the state has consented to suit. The Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity. "[E]ach state is a sovereign entity . . . and . . . [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole*, 116 S.Ct. at 1122 (citations and quotations marks deleted). Although there are other views on the subject of sovereign immunity as demonstrated by the dissents in *Seminole*, it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity.

Maine is not alone in relying upon Eleventh Amendment principles to form and illuminate state sovereign immunity law. Following a thorough discussion of the history of the Eleventh Amendment, the Ohio Supreme Court in *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976) held that the reasoning and purpose of the Eleventh Amendment applied to suit in state courts as well. "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution itself, or from the Eleventh Amendment. . . ." *Mossman*, 346 N.E. 2d at 312. *Accord Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. (1991). [6]

[6] The memorandum of the Secretary of Labor suggests that *Morris* is no longer good law because of the decison of the Supreme Court in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991). In *Morris* the issue was whether state sovereign immunity could be asserted in a Jones Act case. *Hilton* held that FELA and the Jones Act created a cause of action against states enforceable in state courts. Although the actual holding in *Morris* has been modified by *Hilton*, the proposition in *Morris*, that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law, was not disturbed.

Hilton is a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence, except to recognize, as did Justice O'Connor in her dissent, that hard cases make bad law. 502 U.S. at 207. The majority's particularly heavy emphasis on stare decisis is perhaps the only way to explain the case. It certainly seems contrary to the holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) which basically held that if you can't sue a state or state official in a § 1983 claim in federal court, you can't do so in state court either. *Hilton* itself emphasizes that it is a case of pure statutory interpretation, not constitutional interpretation. Whether *Hilton* remains good law after *Seminole* is questionable. *Hilton* claims to recognize the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." Writing for the majority, Justice Kennedy stated that it was desirable to have a symmetry which makes a state's liability or immunity the same in both state and federal courts, but that symmetry could not override expectations that had been built upon stare decisis.

The plaintiffs seek to distinguish the instant case from the four Law Court cases relied upon by Maine. They correctly point out that the Supremacy Clause was not discussed in those four cases. They further argue that if those cases elevate sovereign immunity over the Supremacy Clause, they are wrongly decided and unconstitutional.

The plaintiffs argue that because FLSA unequivocally provides for the recovery of damages from states who have violated the FLSA provisions, the state courts must award such damages when violations are proven. They argue that FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts. Some federal courts have suggested in dicta that such is the case. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), the court dismissed a FLSA action by state employees against Ohio on Eleventh Amendment grounds and stated: "[S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law." *See also Aaron v. State of Kansas*, —— F.3d ——, No. 96-3095 (10th Cir., June 17, 1997). The Tenth Circuit cites to Justice Marshall's concurring opinion in *Em-*

ployees of Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973), in which he stated that state courts have an independent constitutional obligation to enforce employees' rights under FLSA. While dicta from the federal courts cannot be ignored, it cannot be considered controlling particularly when the courts did not analyze the precise issue.

The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. *Mills,* No. 96-1973, 1997 WL 361186. Thus, Congress did not have the power to abrogate Eleventh Amendment immunity in FLSA. Because Congress did not have power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate immunity of states to be sued for damages in their own courts, without their consent.[7] Therefore, the Supremacy Clause does not come into play.

This court concludes that the Maine cases compel a ruling in this action that the plaintiffs are barred by the doctrine of sovereign immunity from collecting damages from Maine in this case. There being no claim for which relief can be granted, judgment must be granted for the State of Maine.

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[7] A state trial court in Wisconsin has come to the same conclusion in a FLSA action against a state agency. *German v. Wisconsin Dep't of Transp.*, Docket No. 96-DV-1261, (Circuit Court, Branch 2, March 11, 1997).

ORDER AND JUDGMENT

The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

Dated: July 18, 1997

/s/ Susan Calkins
SUSAN CALKINS
Superior Court Justice

SUPERIOR COURT

[Caption Omitted]

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiffs, and each of them, appeal from the Order and Judgment entered by the Clerk of the Superior Court in this action on July 22, 1997 wherein judgment is granted to the Defendant, State of Maine.

Dated at Portland, Maine this 5th day of August, 1997.

/s/ Donald F. Fontaine
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MAINE SUPREME JUDICIAL COURT

[Caption Omitted]

APPELLANTS' BRIEF

STATEMENT OF THE CASE

The Plaintiffs are probation and parole officers employed by the State of Maine. In 1992 and 1993 they filed Complaints in Federal District Court to recover unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The State of Maine was found to have violated the Federal Act by failing to pay overtime wages to the Plaintiffs. *Mills v. Maine*, 853 F.Supp. 551, 555-56 (D.Me. 1994).[1] After months of proceedings before a Special Master, the matter was pending for decision before the U.S. District Court for the award of remedies when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). As a result of that decision, the Federal Court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.[2]

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[1] Over the course of nearly three years of proceedings in Federal Court, the Defendant State of Maine did not move to dismiss the Plaintiffs' claims on the grounds of the Eleventh Amendment, nor on the grounds of state sovereign immunity.

[2] The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

> I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, how-

The Plaintiffs then filed a Complaint in the Superior Court. App. A-11. The State filed a responsive pleading raising various defenses among which was that this action is barred by Maine's doctrine of sovereign immunity. App. A-19. Before any evidence was taken, cross motions were filed by both parties to resolve the immunity defense. The Superior Court granted the Defendant's Motion for Judgment on the Pleadings. App. A-46. This appeal followed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does Maine's common law doctrine of sovereign immunity bar this action?

2. Is the Supremacy Clause of the United States Constitution violated when a state court refuses to entertain a cause of action against the State expressly created by Congress in an otherwise valid statute on the grounds that a state common law doctrine of sovereign immunity bars the action?

3. Is the Supremacy Clause of the United States Constitution violated when a state court bars a federal FLSA action against the State for overtime pay while simultaneously permitting similar suits when based on state law?

ARGUMENT

Maine's statutory scheme in a myriad of circumstances makes the State amenable to damages suits in state court

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ever, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

for violating its employees' statutory rights. In this context, it is plain that the invocation of sovereign immunity does not defeat such statutory claims by state employees. Despite the State's routine exposure to state court actions and monetary judgments under Maine employment law, however, the trial court held that the State enjoys categorical immunity when its employees bring wage underpayment claims under the applicable federal statute, the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA").

In so ruling, the trial court ignored the limited scope of Maine's non-constitutional immunity doctrine and misread applicable federal law. The Supremacy Clause of the United States Constitution, which makes valid federal legislation the law of the land in every state court, prohibits state courts from treating state causes of action and federal causes of action differently. This command, we submit, precludes reliance on Maine's common-law sovereign immunity doctrine to shield the State of Maine from liability for failing to pay its employees the wages owed to them under the Fair Labor Standards Act. Because the decision below cannot be squared with Maine sovereign immunity principles, the U.S. Constitution, or controlling law, it must be set aside.

I. MAINE LAW AFFORDS NO BROAD, CONSTITUTIONAL SOVEREIGN IMMUNITY SHIELDING THE STATE FROM ACCOUNTABILITY

The State of Maine has traditionally been accorded certain forms of immunity by the Maine courts. The State's protection from liability, however, does not rest on the Maine Constitution. "We are not bound, as are some jurisdictions, by a constitutional provision which requires sovereign immunity." *Davies v. City of Bath*, 364 A.2d 1269, 1273 n.9 (Me. 1976).[3] Rather, the Maine

doctrine of sovereign or "governmental" immunity has been developed from the archaic English law construct on the status of the Crown. *See Bale v. Ryder,* 286 A.2d 344, 345-46 (Me. 1972).

Not surprisingly, then, from the outset Maine's judge-made immunity doctrine has not furnished a comprehensive bar to claims against the State.[4] Most to the point here, the Maine courts have recognized that, in a democratic republic, this partial immunity is continually vulnerable to erosion by the Maine legislature, which has narrowed the State's protection by enacting a wide variety of laws creating enforceable rights against the State. The legislature, in other words, is free to remove the State's protection against liability and damages, either categorically or in particular cases. *Davies,* 364 A.2d at 1271-73.

In this regard, as the Law Court has confirmed, legislative waiver of sovereign immunity may be implied from a general statutory scheme as well as from a provision expressly granting a cause of action against the State. *Indian Township Passamaquoddy Reservation Housing Authority v. Governor of the State of Maine,* 495 A.2d 1189, 1191 n.2 (Me. 1985). *Accord*: Opinion of the Attorney General, 1990 Me. AG LEXIS 6 (July 6, 1990) (Law Court has extended to Maine the recognized state-law doctrine of waiver by implication). As we now show, the steady aggregation of statutory enactments has all but erased Maine's sovereign immunity in the area of public

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3 Although "the doctrines of soverign immunity and municipal immunity appeared in the common law at different times and for different reasons," they stand on the same footing before the Law Court. *Davies v. City of Bath,* 364 A.2d at 1273 n.9.

4 For example, "invasions of private property and impairments of the use of such property which have been caused by a governmental agency traditionally have been actionable at common law despite the sovereign immunity doctrine." *Foss v. Maine Turnpike Authority,* 309 A.2d 339, 345 (Me. 1973).

employment—and with respect to state employees' wage claims in particular.

More than eighty years ago, for example, the Maine legislature enacted statutes mandating prompt payment of wages owed by the State, counties and municipalities to their workers. *Grant v. City of Saco,* 436 A.2d 403, 406 (Me. 1981) (discussing 1887 and 1911 wage payment statutes). Under the current version of that law, State employees may sue the State for their regular, agreed upon wages if they are not timely paid. 26 M.R.S.A. § 621(2). Moreover, the State is liable for the penalty of triple damages plus attorneys' fees in the event that the employeee prevails. 26 M.R.S.A. § 626-A.

Additionally, the Maine legislature has imposed on the State the statutory liability for a rate of pay without regard to what the parties to the employment contract may have agreed to, and the legislature has created a right of action against the State for payment of the statutory minimum wage. 26 M.R.S.A. §§ 664, 670. The State is specifically defined as an employer subject to suit, and here again, the legislature has made the State liable for a penalty—in this instance, double damages plus attorneys' fees. 26 M.R.S.A. §§ 663(10), 670.

Maine's guarantee of employee rights as against the State itself does not stop with the dual protection afforded to State employees' wages, described above. On the contrary, the Maine legislature has established a host of additional obligations upon employers and protections for employees, both public and private, and has provided those rights and obligations in an identical fashion where the employment relationship is with the State of Maine. The Maine Whistle Blower Statute, for example, protects the employment and the wages of employees who refuse to carry out certain directives or who report certain violations of the law. 26 M.R.S.A. § 833. The State is specifically defined as an employer within the meaning of the

Act. 26 M.R.S.A. § 832(2). Thus, a state employee may bring an action against the State. 26 M.R.S.A. § 834-A. This right of action includes the right to pursue a civil lawsuit against the State for a variety of remedies, including monetary penalties.

The Family Medical Leave Act represents another protection of employment in Maine that covers both the public and private sectors. Employees are statutorily entitled to leave from work without detriment to their employment status for certain family related reasons. 26 M.R.S.A. § 844. The State, again, is specifically defined as an employer within the meaning of the Act. 26 M.R.S.A. § 843(3)(B). A State employee has a cause of action against the State for liquidated damages of up to $100.00 per day as long as the violation occurs. 26 M.R.S.A. § 848.

The Maine Human Rights Act similarly provides protection for employment for most Maine employees. 5 M.R.S.A. § 4551 et seq. The Act provides for monetary relief in court specifically against employers, including back wages and penalties for discrimination on the basis of a variety of factors. 5 M.R.S.A. § 4553(10). The State is specifically listed as an "employer." 5 M.R.S.A. § 4553(4) and (7). Similarly, the Code of Fair Practices and Affirmative Action, 5 M.R.S.A. § 781 expressly subjects the State to judicial enforcement for failure of the State affirmatively to promote anti-discrimination. 5 M.R.S.A. §§ 781, 789-790.

The wages of State employees are again protected by the Maine Workers' Compensation Act. 39-A M.R.S.A. § 101. The State, again, is defined as an "employer" within the meaning of the Act. 39-A M.R.S.A. § 102(12). State employees may litigate various claims against the State arising out of injuries. They may also litigate claims arising out of discriminatory retaliation, whether or not any injury has occurred. 39-A M.R.S.A. § 307; § 353.

The employee can recover not only compensation for his or her injury, but also back wages and attorneys' fees for discrimination. 39-A M.R.S.A. § 353. Administrative hearings are held, and judicial enforcement is provided. Failure of the State, as employer, to make timely payments of compensation subjects the State to forfeitures of up to $200.00 per day for non-compliance. These forfeitures may be enforced by the Superior Court in actions by state employees against their employer. 39-A M.R.S.A. § 324. Even when no injury has occurred, the employer has liabilities. For failure to purchase insurance, the employer is liable for a civil penalty of up to $10,000.00.[5]

Thus the Maine legislature has effectively removed the State's immunity in the area delineated by the State's employment relationship with state employees. However one defines the shifting contours of sovereign immunity under current Maine law, that doctrine plainly affords the State nc plausible defense against claims founded in state law, including the payment of wages owed to its own employees under Maine's own employment statutes. In holding the State immune from state employees' claims for wages owed under a federal statutory counterpart, the Superior Court disregarded the controlling history, context and limitations of Maine's common-law doctrine.

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[5] The Maine legislature has enacted still other protective laws empowering state employees, under appropriate circumstances, to file suit against the State in state court. *See* 26 M.R.S.A. §§ 1043(11)(A-1), 1194(3), 1194(8) (Unemployment Compensation); 26 M.R.S.A. § 979-A(5) (State Employees Labor Relations Act); 14 M.R.S.A. §§ 8103, 8104-A (Maine Tort Claims Act).

II. THE SUPREMACY CLAUSE AND FUNDAMENTAL PRINCIPLES OF FEDERALISM PROHIBIT THE STATE OF MAINE FROM ASSERTING A COMMON-LAW SOVEREIGN IMMUNITY DEFENSE AGAINST FEDERAL CAUSES OF ACTION BROUGHT IN MAINE COURTS.

The trial court erred in holding that the State of Maine executive could assert in its courts a sovereign immunity defense against claims based on a federal cause of action —the Fair Labor Standards Act—for two separate but intertwined reasons, both of which derive from the Supremacy Clause to the United States Constitution and the basic principles of federalism that inform the design of our Nation.

First, state courts are obligated to enforce federal law in their courts and may not interpose state law derived defenses that would frustrate those federal rights. This is so because federal laws enacted within Congress' authority are by virtue of the Supremacy Clause the laws of the state itself and override any contrary state laws.

Second, in Maine, the State has no sovereign immunity defense in connection with state statutory causes of action that are analogous, indeed closely related to the federal FLSA claims asserted by plaintiffs here. That being so, Maine may not discriminate against federal FLSA claims by barring access to its courts on those claims through the sovereign immunity device.

While the Superior Court thought otherwise, the Eleventh Amendment to the United States Constitution—on its face and as most recently interpreted by the Supreme Court in *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114 (1996)—does not alter these settled principles or their application to the case at hand.

A. *The Maine Courts Are Obligated to Enforce FLSA Claims Against the State.*

We first show that under the basic principles derived from the Supremacy Clause, the Maine courts are obligated to enforce federal causes of action, including those brought under the FLSA, notwithstanding any State substantive law to the contrary. We then demonstrate that the Eleventh Amendment has no application to such state court actions.

Basic Supremacy Clause principles

The Supremacy Clause makes valid federal laws "the supreme Law of the Land." U.S. Const. Art. VI. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Howlett v. Rose,* 496 U.S. 356, 367 (1990), *quoting Claflin v. Houseman,* 93 U.S. 130, 136-137 (1876). *See also, Testa v. Katt,* 330 U.S. 386, 390-391 (1947) (*Claflin* "repudiated the assumption that federal laws can be considered by the state as though they were laws emanating from a foreign sovereign.")

It cannot be disputed—nor did the trial court find to the contrary that the federal law at issue here, the Fair Labor Standards Act, authorizes a private right of action against the States by their employees for back wages for asserted violations of the FLSA's overtime or minimum wage provisions. The last twenty-five years demonstrates beyond peradventure Congress' intention to authorize such actions in a manner that fully satisfies the Supreme Court's require-

ment "of a clear statement by Congress to impose such lability" on the States. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 206 (1991). Thus, following *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), which held that Congress had not sufficiently manifested its intention to authorize private actions against the States for monetary liability, Congress adopted the 1974 amendments to the FLSA to remove any questions about its intent. Pub. L. No. 93-259, 88 Stat. 55 (1974).

As the First Circuit recently observed, "[i]n light of this language and the history surrounding it, we agree with the other courts of appeals that have examined the FLSA's provisions and have concluded that the Act contains the necessary clear statement of congressional intent to abrogate state sovereign immunity." *Mills v. Maine*, 118 F.3d 37, 1997 U.S. App. LEXIS 16545, *7 (1st Cir. July 7, 1997).

It is equally beyond dispute that Congress' authorization of such actions—and indeed, its imposition of certain obligations upon the States in regard to the State's employees —does not run afoul of the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976). As the *Garcia* Court held, "nothing in the overtime and minimum wage requirements of the FLSA . . . is destructive of state sovereignty or violative of any constitutional provision." 469 U.S. at 554.

Given that Congress has expressly authorized a private cause of action against the State, and expressly provided for concurrent jurisdiction in the state courts to entertain such claims, the Supremacy Clause dictates that defenses to the federal claim—even when tried in state court—are a matter of federal law. *Howlett v. Rose*, 496 U.S. at 375 ("The elements of, and the defenses to, a federal cause of action are defined by federal law.")

For that reason, the Supreme Court has held that States are not free to "redefine the federal cause of action" by seeking to exempt from liability certain defendants based on the States' "own common-law heritage." *Howlett v. Rose*, 496 U.S. at 375; *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Martinez v. California*, 444 U.S. 277, 284 (1980) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."); *See also Reich v. Collins*, 513 U.S. 106, 110 (1994) (state courts must provide a remedy for state taxes collected in violation of federal law notwithstanding "the sovereign immunity States traditionally enjoy in their own courts.").[6] The rule that state law may not define substantive defenses to federal causes of actions brought in state courts follows from the very text of the Supremacy Clause itself, which provides that the constitutional laws of the United States prevail over "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. Art. VI, cl. 2.

The Superior Court's holding cannot be reconciled with these principles. The Supremacy Clause makes the FLSA equally the law of the State of Maine, and abrogates any common-law immunity that the State might otherwise have available against state causes of action.

B. *The State May Not Discriminate Against Federal Causes of Actions.*

The Superior Court's decision also conflicts with Supremacy Clause principles because it sanctions the state

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[6] In the absence of any remedy in state court for the vindication of a federal right, the United States Supreme Court in *Reich v. Collins, supra*, implied such a state court remedy: "a denial by a State Court of the recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself a violation of the Fourteenth Amendment." 502 U.S. at 549.

courts to discriminate against claims based on whether they derive from state or federal causes of action. Such discrimination has long been held contrary to our nation's basic design and the obligations imposed by the Supremacy Clause.

The Supreme Court has long read the Supremacy Clause to charge "state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367. In this regard, it is "settled that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n. 1 (1982) (O'Connor, J., concurring and dissenting). States must make their courts equally "available for the vindication of federal as well as state created rights." *Id.* at 769.

The principle that states may not favor state causes of action—or selectively disfavor federal causes of action—in state courts is one of long standing. In *Mondou v. New York*, 223 U.S. 1, 58 (1912) (the *Second Employers' Liability Case*), the Supreme Court held that states must hear claims in their courts brought under the Federal Employee Liability Act ("FELA") when "their jurisdiction, as prescribed by local laws, is adequate to the occasion." The Supreme Court explained that the state courts of Connecticut were required to hear the FELA causes because those courts "are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in those cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant." *Id.*

In short, because the state courts were generally available to hear personal injury claims, Connecticut could not close the doors of its courts to such claims brought under a federal cause of action simply because "the act of Congress is not in harmony with the policy of the state." Differences in the State's substantive law regarding negligence or personal injury did not justify closure of its courts to federal claims of the same general type or category.

The principle set forth in *Mondou* has been repeatedly reaffirmed. *See, e.g., Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916) ("where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers."); *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230, 233-4 (1934) ("The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.")

In *Testa v. Katt*, 330 U.S. 386 (1947), the Court again restated this basic principle, making clear that a state violates this anti-discrimination principle even if the federal causes of action which the state bars from its courts are only roughly analogous to state causes of action which the state courts enforce. In *Testa*, Rhode Island courts declined to enforce triple damage provisions available under the federal Emergency Price Control Act when consumer goods were sold at prices that exceeded prescribed ceilings. In holding that the Rhode Island courts were obligated under the Supremacy Clause to hear the federal claims, the Court observed that "it is con-

ceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act." *Id.* at 394. Both types of claims involved liquidated damages or penal sanctions; however, apart from that similarity, in substantive terms, the claims were unrelated, one involving consumer goods, and the other employment standards. *See also F.E.R.C. v. Mississippi*, 456 U.S. at 760 ("The courts of Rhode Island refused to entertain such claims, although they heard analogous state causes of action."); *see also* 456 at 776, at n.1 (O'Connor. J. concurring and dissenting); *Martinez v. California*, 444 U.S. at 283, n.7 ("We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim.").

In *F.E.R.C. v. Mississippi*, for example, a federal act required state utility commissions to implement the federal scheme by making their procedures available to resolve disputes between different participants in the electric utility industry. The Supreme Court held that Mississippi could not seek to limit disputes before its public service commission based on whether the dispute resolution procedure was mandated by federal or state law: "In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission." 456 U.S. at 760. The Supreme Court concluded that "we again find the principle of *Testa v. Katt, supra,* controlling: the State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights." *Id.* at 769.

And just last Term, in *Printz v. U.S.*, 65 LW 4731 (June 27, 1997), the Supreme Court once again reaffirmed

the basic principle of *Testa v. Katt* and the *Second Employers Liability Cases.* Justice Scalia, writing for the majority, recognized the continuing durability of the principle stated in *Testa*—"that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." 65 LW at 4740; see also, 4733, at n. 1, quoting from *Mondou, supra,* 223 U.S. at 56-57. Indeed, Justice Scalia carefully distinguished—based on the Supremacy Clause—Congress' recognized power to require state courts to enforce state laws and from what he viewed as the novel requirement of the Brady bill which required state legislaitve and executive officials to carry out federal laws which were not of general applicability. *Id.*

These principles dictate that Maine cannot selectively bar claims in its courts based on the origin of the cause of action.

> [T]he principle upon which the [*Second Employer's Liability Case*] rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Bombolis, supra,* 241 U.S. at 222-223.

Under *Testa* and the *Second Employer Liability Case,* then, the types of state causes of action against the State that Maine has opened its courts to hear are analogous to the federal claim advanced by plaintiffs here. Indeed, we need not search far and wide to find a state cause of action which Maine law permits to be maintained in the courts of the State which is analogous to the federal cause

of action at issue in this case. There are, in fact, many state causes of action that, in spite of state common law doctrine of sovereign immunity, are maintained against the State in the employment law setting. They authorize damages against the State as well as penalties and attorney's fees. See *supra* at pp. 3-6. Indeed, there are some state causes of action that are all but identical to the federal cause of action at issue. Both the Maine statute and the federal statute authorize suit against the State to recover statutorily defined minimum wages. Indeed, the State statute adopts the federal definition of minimum wage. Compare 26 M.R.S.A. § 664(1) with 29 U.S.C. § 206. Both statutes require pay for hours over 40 with Maine again adopting the federal definition.[7] Compare 26 M.R.S.A. § 664(2) with 29 U.S.C. § 607. Both statutes create a liability for liquidated damages in addition to the wages protected: in the case of FLSA the court may, at its discretion, award double damages, whereas under the state Act double damages for the first 40 hours of work are mandatory, and triple damages are mandatory for any unpaid but contracted for compensation for hours after 40. 26 M.R.S.A. § 621(2). Both statutes authorize the payment of attorney's fees by the State to the employee's attorney in a successful suit. Compare 26 M.R.S.A. §§ 626-A, 670, with 29 U.S.C. § 216(b). The differences are minor and technical. Thus, the only meaningful basis on which to distinguish the kinds of claims that the State clearly permits to be brought against it in state court from the claims that the Superior Court in this case excluded from the court is the fact that the plaintiffs' claims here are founded on a *federal law*, while the claims that are permitted by the above statutes are founded on *state* laws. But to discriminate on this basis in the decision of

[7] While the State statute does not impose a minimum overtime rate against the State for hours over 40, it creates a remedy for triple damages which includes any unpaid wages owed for work performed after 40 hours. 26 M.R.S.A. §§ 621(2), 626-A.

whether or not to grant a hearing on the federal claims surely offends the Supremacy Clause and the coordinate respect that states owe to the federal government under our system of dual sovereignty.

As we catalogue at great length in Part I of our brief,[8] the immunity which the defendant asserts in this action is one defined more by its absence than its presence. Having effected waivers of sovereign immunity through the legislative creation of so many state causes of action that are analogous in character to the federal claim asserted here, the State cannot now assert that there is sovereign immunity simply because plaintiffs claim has its origin in a federal enactment.

Whatever notions of sovereign immunity may be implicit in the Eleventh Amendment, they do not include any right of the state to arbitrarily define the scope of that immunity. The sovereignty of the State is hardly swept away by permitting claims for minimum overtime to proceed where the State has already conceded that claims for minimum wages, and a host of other employment related matters, do not threaten or impair its autonomy or sovereignty. A State may retain the power "to determine . . . the character of the controversies which shall be heard in [its courts]," *McKnett, supra*, 292 U.S. at 233, but that does not mean that states may distinguish between suits of the same basic type based on whether the liability is grounded in state or federal law.

C. *The Eleventh Amendment Does Not Apply to State Court Actions*

1. Nothing in *Seminole Tribe, supra*, or the Eleventh Amendment undermines these settled principles regarding the Supremacy Clause and the obligations that it imposes on state courts.

[8] See pp. 3-6, supra.

(a) In terms, the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Thus, the Amendment works a limitation on "the Judicial power of the United States" over certain cases and controversies, and only upon such power. In other words, the Eleventh Amendment simply has no application to state judicial power. Moreover, it is particularly to the point that nothing in the Eleventh Amendment limits Congress' Article I legislative powers or the force of the Supremacy Clause with regard to consitutional congressional enactments, or the obligation of the state courts to enforce valid federal statutes.

(b) The Supreme Court has long emphasized that, consistent with its text, the Eleventh Amendment—and the immunity from suit in federal court that it works—does not apply to suits in the state courts. See, in particular, the extensive explanation of this principle in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-205 (1991) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts' "). See also *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States' ").[9]

And in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court, in upholding an Eleventh Amendment defense to federal court jurisdiction, expressly rejected the suggestion that a State that is immune from suit in federal court because of the Eleventh Amendment

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[9] Indeed, this Court has also recognized that basic principle. *Moody v. Commissioner*, 661 A.2d 156, 158 n.3 (Me. 1995).

is not subject to the federal suit in the state courts, by stating;

> Justice Brennan's dissent also argues that in the absence of jurisdiction in the federal courts, the States are 'exemp[t] . . . from compliance with laws that bind every other legal actor in our Nation.' Post, at 248. This claim wholly misconceives our federal system. As Justice Marshall has noted, 'the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of States to suit before *federal tribunals.*' *Employees v. Dept. of Public Health*, [411 U.S. at 293-94] (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. [473 U.S. at 239-40, n.2.]

(c) *Seminole Tribe*, heavily and erroneously relied on by the Superior Court, was careful to describe its holding as limiting Congress' power to authorize suits in the federal courts: "The Eleventh Amendment prohibits Congress from making the state of Florida capable of being sued in *federal court*." 116 S.Ct. at 1133 (emphasis supplied). Nothing in the opinion suggests that the view of the Eleventh Amendment articulated there embraces any notion that Supremacy Clause does not apply where state courts are otherwise open to hear claims against States.

Indeed, the federal courts considering the issue since *Seminole* have uniformly held that, notwithstanding any Eleventh Amendment bar to federal court jurisdiction, state courts remain available and obligated to enforce private FLSA actions against the States. *See, e.g., Aaron v. Kansas*, 3 WH Cases 2d 1733, 1736-37 (10th Cir. June 17, 1997) ("Moreover, our holding today does not permit states to avoid their legal duty to comply with the wage and overtime provisions of the FLSA, nor does our hold-

ing deny recourse for a state employee denied his or her right. . . . The employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law."); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) ("Our holding today does not permit states to avoid their legal duty to comply with the provisions of the FLSA . . . state employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law.").[10]

For these reasons, the trial court erred, both as a matter of the Maine law of sovereign immunity itself, and under Eleventh Amendment jurisprudence, in holding that private actions based on federal claims were precluded in Maine courts whenever the Eleventh Amendment would bar such suits in federal courts. However, this Court need not reach the issue of whether Maine could interpose a sovereign immunity defense to the federal claims under hypothetical circumstances where Maine law consistently interposed state immunity to state-based causes of action. For as we have shown, Maine has waived any such defense in regard to a broad array of state causes of action, and having done so, cannot interpose that defense selectively against federal causes of action. To authorize such discrimination would be to turn the federalism concern that animates the Court's Eleventh Amendment case law on its head.

2. Maine's doctrine of sovereign immunity in state court is different from its Eleventh Amendment immunity in federal court.

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10 *See also Mulverhill v. New York*, 4 WH Cases 2d 15 (N.D.N.Y. July 11, 1997); *Rehberg v. Department of Public Safety*, 946 F. Supp. 741 (S.D. Ia. 1996); *Taylor v. Virginia DOT*, 3WH Cases 2d 1196, 1996 U.S. Dist. LEXIS 19747 (E.D. Va. Dec. 18, 1996).

The court below sought to escape the controlling force of the Supremacy Clause by mischaracterizing Maine's common-law sovereign immunity doctrine as "synonymous" with the Eleventh Amendment, such that the denial of a state forum automatically follows from denial of a federal forum. The trial court did so by fundamentally misreading four decisions of this Court as dictating the reflective incorporation of every Eleventh Amendment result into the common law of Maine: *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291 (Me. 1988); and *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995). As we now show, the Law Court has not in fact equated Maine's judicial sovereign immunuity doctrine to the Supreme Court's Eleventh Amendment doctrine. Rather, these cases merely elaborate Maine's existing law by drawing on the recognized rule that only federal legislation *clearly stating* a congressional intent to subject the states to liability can support a federal cause of action against a state.

Drake v. Smith, which involved an unlicensed nursing home's claim for payments from the State under a federal/state cooperative program, belies any suggestion that governmental immunity in the Maine courts under Maine common law follows automatically from Eleventh Amendment immunity in the federal courts. To the contrary, even though the Law Court in *Drake* accepted that the State could not be sued in federal court, 390 A.2d at 346, it reasoned extensively from the nature of the claimed liability and the structure of the statutory program that these enactments could not reasonably support the implication of a state-federal legislative intent to subject the State of Maine to monetary liability in its own courts.[11]

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11 Thus, the Court first explained that the statuory plan put the State not in a direct contractual relationship with aid recipients

There was no hint that this court believed that state sovereign immunity followed automatically from Eleventh Amendment immunity.

Thiboutot v. State, a case involving class claims for federal welfare benefits administered by the State of Maine, is similarly devoid of any suggestion that the Eleventh Amendment provides the governing rules of Maine's own sovereign immunity law. The Law Court, rather, addressed the consequences of prior Supreme Court holdings that Congress had *not* intended to subject the States to retrospective monetary liability under 42 U.S.C. Section 1983. Thus, *Thiboutot* drew by analogy on only one narrow facet of established Eleventh Amendment law —the undisputed threshold requirement of a "clear statement" of Congressional intent to impose such liability on the states. *See Hilton, supra,* 502 U.S. at 206. Neither *Thiboutot* nor the cases it relied on decided that a state-court sovereign immunity defense trumps a federal statute embodying the requisite "clear statement." Indeed, *Thiboutot* emphasized the significant "federalism" concerns that support a state court forum for such claims: "Adjudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations and is consistent with the concept of federalism expounded in *Younger v. Harris.*" 405 A.2d at 235 (citations omitted).

In dealing with Maine's own sovereign immunity law, moreover, the *Thiboutot* Law Court straightforwardly ap-

or vendors, but, rather, in the role of an administrative "conduit" for federal aid. The Court further found that participation in a federal program did not necessarily imply that the State had undertaken sole responsibility to pay unlicensed vendors who were not and could not be paid with federal funds. To underscore its conclusion in this regard, the Law Court noted the anomaly of reading the same opaque statute as simultaneously accepting and rejecting that unfunded financial burden depending on whether the claim is brought in state or federal court. 390 A.2d at 546.

plied Maine's non-constitutional doctrine, as it had done in *Drake*. Thus, before examining the plaintiffs' rights under 42 U.S.C. § 1983, the Law Court analyzed the applicable state legislative and regulatory scheme to determine the extent to which they removed the State's immunity in state court.[12] To be sure, while basing its holding expressly on the *Drake* rationale, the Law Court in *Thiboutot* admittedly "fortified" its conclusion by invoking a "theme" and certain policy "considerations" underlying the Supreme Court's reluctance to afford retrospective remedies against state governments in Section 1983 cases.[13] 405 A.2d at 237. But given the shifting rationales and extensive dicta in those cases, the Law Court ultimately focused on *Edelman v. Jordon*'s narrow reading of 42 U.S.C. § 1983—that "Congress did not intend to abrogate

[12] The Law Court concluded that the state enactments afforded retrospective monetary relief only to named plaintiffs who qualified as "claimants" under state law, not to the unnamed class members who failed actively to pursue their state claims. 405 A.2d at 234. In reaching its conclusion, however, the Law Court also recognized that Maine's soverign immunity will not defeat claims based on higher-order "property" interests, citing *Foss v. Maine Turnpike*. Specifically distinguishing welfare aid under the statutory scheme from "a property right like the right to payments under an annuity contract or the right to rent under a lease," the Law Court found that the precedent denying immunity in property-taking cases did not control in view of "the qualified nature of welfare rights." 405 A.2d at 234. Compare *Mercier v. Town of Fairfield*, 628 A.2d 1053, 1055-56 (Me. 1993), *Barber v. Inhabitants of the Town of Fairfield*, 460 A.2d 1001, 1007-08 (Me. 1983), and *Lovejoy v. Grant*, 434 A.2d 45, 50 (Me. 1981) (rules and understanding that secure certain benefits may give rise to property interests with respect to public employment).

[13] In particular, the Law Court noted the "peculiar" nature of liability for retrospective welfare benefits withheld in good faith, the potentially great financial burden of unanticipated relief to a large class of individuals, who had not pursued individual claims, and the adverse impact that would result from allocating scarce welfare resources first to corrective payments at the expense of even more critical current needs. 405 A.2d at 237.

the states' sovereign immunity" when enacting this legislation. 405 A.2d at 236-37.

Ten years after *Thiboutot* the Law Court revisited the same terrain in *Jackson v. State* without adding anything new to Maine's law on sovereign immunity. As in *Thiboutot*, the *Jackson* Court duly applied federal law to decide the merits of a federal statutory claim prosecuted against the State of Maine in state court. 544 A.2d at 297-98. Like the federal civil rights statute addressed in *Thiboutot*, the Rehabilitation Act involved in *Jackson* had already been held deficient to support such a cause of action by the Supreme Court under the threshold "clear statement" test. Given the absence of Congressional intent to impose the asserted obligaitons on the State of Maine, the Law Court simply followed *Thiboutot*, 544 A.2d at 298-99.

Moody v. Commissioner, the most recent decision relied on by the court below, is yet another case on the theme of retrospective relief in class actions claiming welfare benefits. The Law Court again cited *Edelman v. Jordan* and *Thiboutot* in ruling that relief relating solely to retroactive payment of welfare benefits is unavailable against the State. 661 A.2d at 158-159. Indeed, the Law Court acknowledged in a footnote that the Eleventh Amendment itself "is not directly applicable to state courts." *Id.* at 158 n.3. Apart from the Eleventh Amendment, however, the Court added that the doctrine of sovereign immunity "similarly" protects the states from actions of state courts, citing *Thiboutot* and *Drake*. *Id.* That observation, unremarkable on its face, in no way expands or modifies the substance of the Maine common-law immunity doctrine in effect at the time of *Drake* and *Thiboutot*.[14]

[14] To buttress its misreading of Maine law, the trial court relied on *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976), *Weppler v. School Board*, 311 So. 2d 409 (Fla. Dist. Ct. App. 1975), and *Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. 1991). Those decisions, however, add no weight to the holding

Against this background, the court below manifestly erred in its conclusion that incorporation of "Eleventh Amendment principles" into Maine law automatically gives the State immunity against a federal claim in state court whenever a federal forum is unavailable. The trial court's failure to define the supposedly incorporated "principles" is problematic in itself. But no fair reading of the cited cases can support the unqualified assertion that the reach of Maine's sovereign immunity doctrine has expanded to incorporate by reference the outcome of every Eleventh Amendment ruling. On the contrary, the Law Court's continued citation to *Thiboutot* and *Drake* only reaffirms that Maine's own judicial doctrine of sovereign immunity, to the extent it applies, remains limited and non-constitutional in nature. Thus, no ritual invocation of "Eleventh Amendment principles" can obscure the fact that Maine legislature, through its system of state employment statutes, has already removed the State's shield against state employees' wage claims under Maine law. And nothing in Maine law empowers the courts to revive such

below. *Mossman* and *Weppler* are irrelevant because both decisions addressed only the pre-1974 version of the FLSA, concerning which the Supreme Court had ruled in *Employees of the Department of Health & Welfare, supra*, 411 U.S. at 279, that the federal statute as it read in 1973 contained no clear statement of Congressional intent to subject the states to its requirements. As we have shown above, the 1974 FLSA amendments specifically redressed that "clear statement" deficiency; moreover, the Ohio court's confusion of Eleventh Amendment issues with Tenth Amendment concerns about burdens on the state government was subsequently disposed of by the Supreme Court's express holding in *Garcia, supra*, that the FLSA is within Congress's Constituional power to impose on the states. *Morris* similarly involved a federal statute, the Jones Act, that had been held to lack the requisite clear statement of intent to abrogate states' immunity. The *Morris* opinion specifically distinguished the post-1974 FLSA and cited *Garcia* for the proposition that "the supremacy clause gives Congress the power to abrogate State court immunity in its [i.e. the State's] own as well as in federal courts." 565 N.E.2d at 427.

a shield selectively, so as to bar only those wage claims based on a valid federal statute.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the judgment of the Superior Court must be set aside.

Dated: October 7, 1997

Respectfully submitted,

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STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
LAW COURT

Docket No. CUM-97-446

JOHN H. ALDEN, *et al.*,
Plaitiffs-Appellants

v.

STATE OF MAINE,
Defendant-Appellee

On Appeal From The Superior Court

APPELLEE'S BRIEF

STATEMENT OF FACTS

The plaintiffs-appellants, 72 current and former probation officers, appeal from a decision of the Superior Court, Cumberland County (Calkins, J.), granting judgment on the pleadings to the defendant-appellee, State of Maine ("Maine"). On appeal, the plaintiffs allege that the court improperly held that the plaintiffs' claim for overtime under the Fair Labor Standards Act was barred by the doctrine of sovereign immunity.

The plaintiffs assert that Maine did not properly pay them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. Maine has disputed that contention for years, and con-

tinues to dispute that contention. Following extensive proceedings during the past four years in federal court, which were ultimately dismissed on sovereign immunity grounds, the plaintiffs brought their dispute to state court, which likewise dismissed their claims on sovereign immunity grounds.

Plaintiffs' Federal Court Lawsuit. On December 21, 1992, the plaintiffs in this case, along with 24 other probation officers, filed their complaint in federal court, seeking overtime under the FLSA. Appendix ("App.") A38-A42. In its answer, Maine asserted affirmative defenes based, *inter alia*, on sovereign immunity, the tenth amendment, and the eleventh amendment.

On December 21, 1993, the U.S. District Court held on partial summary judgment that the plaintiffs were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). This was not a final judgment and thus neither the plaintiffs nor Maine could appeal the portions of the decision with which they disagreed. On June 1, 1994, the district court determined on a stipulated record the method of calculating the overtime owed to the plaintiff. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994). Once again, this was not a final judgment, and thus neither the plaintiffs nor Maine could appeal the portions of the decision with which they disagreed.

Meanwhile, because the collective bargaining agreement made plain that the plaintiffs could receive overtime under the FLSA *or* a 16% non-standard premium in lieu of overtime, but not both, the result of the district court's decision that the plaintiffs were eligible for overtime under the FLSA was that, beginning on February 6, 1994, Maine began paying the plaintiffs overtime instead of the 16% non-standard premium. Ironically, the plaintiffs then sued Maine and five state officials for paying them overtime

(instead of the 16% non-standard premium), alleging that they had engaged in retaliation against them in violation of section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3). This claim was rejected both by this district court and by the First Circuit on the ground that Maine's action was permitted, and indeed was mandated, by the collective bargaining agreement. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996).

Following the district court's decision on the method of calculating overtime, *see Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994), Maine proposed to calculate the overtime based on the attested time records the plaintiffs signed and submitted each week (reserving its appeal rights on the underlying liability decision), and five of the 96 plaintiffs agreed, resulting in stipulated decisions concerning the damages for those five plaintiffs. The vast majority of the plaintiffs, however, chose to contest the accuracy of their own time sheets, and therefore, on August 25, 1994, the district court appointed a special master to calculate the overtime. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997).

Following extensive proceedings before the special master, including over 14 days of testimony, hundreds of pages of briefs, and countless rulings (and following agreement on the amounts for certain additional plaintiffs based on the various rulings of the special master and the district court), on December 28, 1995, and on April 16, 1996, the special master issued his reports on the remaining, unliquidated claims. Although most, but not all, of the plaintiffs were found to be entitled to some additional overtime, the special master largely rejected the plaintiff's claims. In the first report, although the plaintiffs contended that 11 of the remaining plaintiffs were owed an additional $204,000, the special master concluded that they were only owed an additional $4,100. In the

second report, the special master awarded less than half of the additional overtime claimed by the plaintiffs. Both the plaintiffs and Maine objected to the special master's reports, and those objections were still pending when the federal lawsuit was dismissed.

While the parties' objections to the special master's report were still pending before the district court, on March 27, 1996, the Supreme Court held that Congress did not have authority to abrogate a State's eleventh amendment immunity under the Commerce Clause. *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996). Based on that decision, Mane moved to dismiss the federal lawsuit for lack of subject matter jurisdiction on sovereign immunity grounds. On July 3, 1996, like every one of the many federal courts that have considered the issue, the district court dismissed the plaintiffs' suit, a ruling which was subsquently affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

Plaintiffs' State Court Lawsuit. On July 31, 1996, the plaintiffs filed the instant state court action, seeking to relitigate the overtime claims they presented to the federal court. App. A11-A13. Indeed, the plaintiffs even sought to relitigate the issues they had lost in federal court, such as the appropriate statute of limitations. *Compare* App. A12-13 (claiming three year statute of limitations) *with Mills v. Maine*, 853 F. Supp. at 555-56 (rejecting three year statute of limitations).

Following several amendments to the complaint to add additional plaintiffs, App. A24-A28, A48-A52, on December 18, 1996, the plaintiffs moved to strike two of Maine's affirmative defenses, namely, sovereign immunity and the statute of limitations. App. A31-A44. On February 4, 1997, Maine filed a motion for judgment on the pleadings based on the same two defenses. App. A45. The United States Secretary of Labor was then granted leave to participate as *amicus curiae*. App. A47.

Following extensive oral argument, on July 18, 1997, the Superior Court, like every other state court that has considered this issue since *Seminole Tribe*, held that the plaintiff's FLSA claims were barred in state court by the doctrine of sovereign immunity. App. A57-A68. This appeal followed. App. A69.

STATEMENT OF ISSUES

1. Should this court reject the plaintiffs' new argument on appeal that the Legislature waived Maine's sovereign immunity for FLSA overtime claims?

2. Did the court below properly hold that the plaintiffs' FLSA overtime claims were barred by the doctrine of sovereign immunity?

SUMMARY OF ARGUMENT

The plaintiffs argue first that the Legislature waived Maine's sovereign immuniy for FLSA overtime claims by passing numerous statutes expressly waiving Maine's sovereign immunity. This argument should be rejected out-of-hand because the plaintiffs did not even allude to this theory in the Superior Court. Moreover, the Legislature has expressly not waived Maine's sovereign immunity for overtime claims. Indeed, this new argument on appeal simply underscores Maine's contention that, absent an express legislative waiver, Maine retains its sovereign immunity, which is "one of the highest attributes inherent in the nature of sovereignty." *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978).

The plaintiffs then argue that Maine cannot interpose sovereign immunity as a defense to a federal cause of action. This argument flies in the face of over 20 years of decisions from ths court. Moreover, the critical issue is not whether Congress intended to subject States to suit in their own courts, but rather whether Congress has the power to do so. As the Supreme Court has now held, Congress lacks the power to abrogate State sovereign

immunity under the Commerce Clause. The plaintiffs cannot sue Maine for FLSA damages in either federal or state court.

ARGUMENT

I. THIS COURT SHOULD REJECT THE PLAINTIFFS' NEW ARGUMENT ON APPEAL THAT THE LEGISLATURE WAIVED MAINE'S SOVEREIGN IMMUNITY FOR FLSA CLAIMS.

The plaintiffs argue that the Legislature waived Maine's sovereign immunity for FLSA claims by enacting various statutes governing wages and by enacting numerous other statutory waivers of sovereign immunity. *See* Appellants' Brief at 5-9. This court need not even address the merits because this argument was never raised in the court below, and it is well established that this court will not consider new arguments on appeal.

In the court below, the plaintiffs argued only that Maine could not assert a sovereign immunity defense in the face of the Supremacy Clause. *See* App. A32-A34. The plaintiffs did not cite any state statutes governing wages, much less argue that they were applicable. On the contrary, the plaintiffs argued that their FLSA claims were not barred by the statute of limitations because they were simply asserting the same claim they had asserted in federal court, *i.e.*, a federal FLSA overtime claim (as opposed to a state overtime claim). *See* App. A34-A36.

Likewise, the plaintiffs did not cite any other statutory waiver to assert that the Legislature had somehow waived Maine's sovereign immunity for overtime claims. On the contrary, Maine argued in the court below that the Legislature had expressly refused to waive Maine's sovereign immunity for overtime claims. *See* 26 M.R.S.A. § 664 (3)(D). The plaintiffs' failure to respond to this argument in the Superior Court is even more telling.

This Court recently reiterated that "a party is bound on appeal by its strategy at trial." ***Townsend v. Chute***

Chemical Co., 1997 ME 46, ¶ 11,691 A.2d 199, 203. This means that this court will not consider a new argument on appeal. *Poire v. Manchester*, 508 A.2d 1160, 1164 (Me. 1986).

> Specifically, proper appellate practice will not allow a party to shift his ground on appeal and come up with new theories after being unsuccessful on the theory presented in the trial court. It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below.

Teel v. Corson, 396 A.2d 529, 534 (Me. 1978) (citation omitted); *accord Morris v. Resolution Trust Co.*, 622 A.2d 708, 714 (Me. 1993) ("well established" that a party is held to have waived new issue on appeal); *Berner v. Delahanty*, 1997 WL 6590112, No. 96-2122, slip. op. at 21 n.8 (1st Cir. Oct. 28, 1997) (appellant "has forfeited his right to argue a new, much different theory on appeal") (citations omitted).

It is irrelevant whether or not the new issue on appeal is a constitutional issue:

> No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.

Cyr v. Cyr, 432 A.2d 793, 797 (Me. 1981) (citations omitted).

Applying this standard, this court should reject out-of-hand the plaintiffs' newly minted argument that the Legislature somehow waived Maine's sovereign immunity for overtime claims. In any event, on the merits, the plaintiffs are wrong.

The plaintiffs argue that Maine has waived its sovereign immunity for various wage claims. *See* Appellants' Brief

at 6-7. None of these authorities remotely support the plaintiffs' contention that the Legislature has waived Maine's sovereign immunity for federal FLSA overtime claims. Although the plaintiffs argue that "[m]ore than eighty years ago, * * * the Maine legislature enacted statutes mandating prompt payment of wages owed by the State, counties, and municipalities to their workers[,]" Appellants' Brief at 6, the cited statutes did not even apply to the State, and the cited case held, applying the plain language of the statute, that teachers were *not* subject to these statutes. *See Grant v. Saco,* 436 A.2d 403, 406 (Me. 1981) (quoting statutes).

The plaintiffs rely on a statute that permits State employees to sue for their regular, agreed upon wages if they are not timely paid. *See* Appellants' Brief at 6 (citing 26 M.R.S.A. § 626-A). In this case, however, the plaintiffs received their regular, agreed upon wages, which included a 16% non-standard premium in lieu of overtime—and which paid them more money than overtime. *See generally Blackie v. Maine,* 75 F.3d 716 (1st Cir. 1996). The plaintiffs also rely on the state statutory minimum wage, *see* Appellant' Brief at 6-7 (citing 26 M.R.S.A. §§ 664, 670), but the plaintiffs—who earn over $15.00 an hour—do not, and cannot, contend that this statute was violated in this case.

The plaintiffs studiously ignore the only wage statute that is even arguably relevant in this lawsuit, namely, the state statute governing overtime claims. 26 M.R.S.A. § 664(3). In that statute, however, the Legislature expressly stated that the overtime provisions do not apply to "public employees," 26 M.R.S.A. § 664(3)(D), which are defined to include State employees such as the plaintiffs, 26 M.R.S.A. § 663(10). Thus, it is beyond debate that the Legislature has not waived Maine's sovereign immunity for overtime claims.

The plaintiffs rely on a number of other statutes that purportedly waive Maine's sovereign immunity, none of

which have anything to do with wages, much less overtime claims. *See* Appellants' Brief at 7-9. Although irrelevant, these statutes reinforce the conclusion that an express legislative waiver is necesary before a court can conclude that Maine has waived its sovereign immunity. Otherwise, these statutory waivers would be superfluous.

> This Court regards the immunity from suit "as one of the highest attributes inherent in the nature of sovereignty" and accordingly, it has said that, generally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity. *See Drake v. Smith,* [390 A.2d 541, 543 (Me. 1978)].

Cushing v. Cohen, 420 A.2d 919, 923 (Me. 1980), *appeal after remand sub nom. Cushing v. State,* 434 A.2d 486 (Me. 1981). Furthermore, express statutory waivers to the general rule of sovereign immunity must be narrowly construed. *See, e.g., Hodgdon v. State,* 500 A.2d 621, 624 (Me. 1985).

Stated differently, we begin with the general rule of sovereign immunity, which must be waived expressly by the Legislature, and then, any such waivers must be construed narrowly. In this case, the plaintiffs never even overcome the general rule of sovereign immunity since there was no express waiver in this case.

II. THE SUPERIOR COURT PROPERLY HELD THAT THE PLAINTIFFS' FLSA CLAIMS WERE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

The plaintiffs argue that under the Supremacy Clause, Maine cannot interpose a sovereign immunity defense to a federal FLSA claim. *See* Appellants' Brief at 9-30. The Superior Court, however, properly held otherwise.

First, as the Superior Court noted, this court has held on four occasions over the past 20 years that "if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either," and thus, these "Maine cases compel a ruling in this action that the plaintiffs are barred by the doctrine of sovereign immunity from collecting damages from Maine in this case." App. A64, A67-A68 (decision below).

Second, the plaintiffs' Supremacy Clause argument must be rejected following *Seminole Tribe v. Florida,* 116 S. Ct. 1114 (1996):

> The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. Thus, Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent. Therefore, the Supremacy Clause does not come into play.

App. A67 (decision below) (citing *Mills v. Maine,* 118 F.3d 37 (1st Cir. 1997)). We consider each argument in turn.

A. The Plaintiffs' FLSA Damage Claims Are Barred By Controlling Law Court Sovereign Immunity Decisions.

In 1996, the Supreme Court held that Congress does not have the power to abrogate State sovereign immunity

under the eleventh amendment when it enacts legislation pursuant to Article I of the United States Constitution. *Seminole Tribe v. Florida,* 116 S. Ct. 1114 (1996). The First Circuit, in this case, like every other federal court that has addressed the issue since *Seminole Tribe,* then concluded that the Fair Labor Standards Act was passed pursuant to Article I, and thus Congress lacked the power under the eleventh amendment to abrogate State sovereign immunity in federal court. *Mills v. Maine,* 118 F.3d 37 (1st Cir. 1997); *see also Aaron v. Kansas,* 115 F.3d 813, 817 (10th Cir. 1997) (collecting cases). Thereafter, the Superior Court, in this case, like every other state court that has addressed the issue since *Seminole Tribe,* concluded that the eleventh amendment jurisprudence should also be applied in state court, and thus, if Congress did not have the power to abrogate State sovereign immunity in federal court for FLSA actions, it likewise did not have the power to abrogate State sovereign immunity for FLSA actions in state court. App. A61-A68; *see also* Addendum (collecting cases from Arkansas, Wisconin, and Maryland).

In reaching this result, the Superior Court relied upon an unbroken line of Law Court decisions over the past 20 years. The plaintiffs now contend that these Law Court precedents do not support the invocation of sovereign immunity in this case. *See* Appellants' Brief at 24-30. As the court below found, however, the plaintiffs have simply misread these decisions. *See App.* A61-A64.

On four occasions, this court has addressed the issue whether plantiffs could obtain retroactve money damages against Maine in state court under a federal statute when Maine was immune from such claims in federal court, and this court has uniformly held that such claims are precluded by Maine's sovereign immunity. *See Drake v. Smith,* 390 A.2d 541, 542-44 (Me. 1978); *Thiboutot v. State,* 405 A.2d 230, 232-37 (Me. 1979), *aff'd on other grounds,* 448 U.S. 1 (1980); *Jackson v. State,* 544 A.2d 291, 298-99 (Me. 1988), *cert. denied,* 491 U.S. 904 (1989);

Moody v. Commissoner, Department of Human Services, 661 A.2d 156, 158-59 (Me. 1995). In each case, this court looked to eleventh amendment jurisprudence to determine whether sovereign immunity barred the plaintiffs' claims, and after notng that the plaintiffs could not obtain the requested relief in federal court, likewise concluded that the plantiffs could not obtain the requested relief in state court. In each case, this court sought to avoid the anomalous result advocted by the plaintiffs—that the only forum for enforcement of a *federal* statute would be a *state* court.

In *Drake v. Smith,* 390 A.2d 541 (Me. 1978), this court began with the observaton that "[t]he immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty. *Id.* at 543 (citations omitted). In evaluating the plaintiffs' claim for nursing home payments under a cooperative federal welfare program, this court noted "the State's immunity * * * as protected by the 11th Amendment" in federal court before concluding that the State likewise must be immune from such suits in state court. *Id.* at 546 (citing *Edelman v. Jordan,* 415 U.S. 651 (1974) (eleventh amendment precludes federal damage actions against States for violating federal welfare laws)).

The plaintiffs attempt to disinguish *Drake* on the grounds that the case only concerned Congress' intention to abrogate State sovereign immunity. *See* Appellants' Brief at 25-26. This misreads the import of this decision. Since Congress has the authority to abrogate state sovereign immunity under section 5 of the fourteenth amendment (the source of the federal welfare laws), but not under the Commerce Clause (the source of the FLSA), *see Seminole Tribe,* 116 S. Ct. At 1228; *Mills v. Maine,* 118 F.3d 37, 42-49 (1st Cir. 1997); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 454 (1976), Congress' intent to abrogate sovereign immunity was the dispositive factor in *Drake.* However, the critical point is that this court relied upon the Supreme Court's eleventh amendment analysis

to determine that in cases in which States are immune from monetary awards in federal court under the eleventh amendment, the State of Maine is likewise immune from such suits in state court:

> The [Law Court] held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts.

App. A62 (decision below) (citing *Drake,* 390 A.2d at 546).

In *Thiboutot v. State,* 405 A.2d 230, 232-37 (Me. 1979), *aff'd on other grounds,* 448 U.S. 1 (1980), a case involving federal welfare benefits, the Law Court, "[r]elying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, held that state sovereign immunity likewise barred the award of retroactive benefits in state court." App. A62 (decision below) (citing *Thiboutot,* 405 A.2d at 236-37).

> The appellant seeks to have defendant State of Maine adjudicated liable to pay money to the members of the class in the form of retroactive AFDC-benefits. The sovereign immunity of the State of Maine precludes such a judgment unless the state has given its consent to be sued.

Thiboutot, 405 A.2d at 232-33 (Me. 1979).

The plaintiffs attempt to distinguish *Thiboutot* on the grounds that it only involved Congress' intention to abrogate State sovereign immunity. *See* Appellants' Brief at 26. Once again, this is unavailing on the fundamental point that *Thiboutot* construed State sovereign immunity as congruent with eleventh amendment immunity. The plaintiffs then simply dismiss *Thiboutot* as *dicta,* which is mere wishful thinking.

These cases are scarcely the vestiges of a bygone era. On the contrary, this court subsequently rejected on sovereign immunity grounds a claim for damages under section 504 of the federal Rehabilitation Act, noting that in *Thiboutot*, "[w]e stated '[t]hough the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar * * *.'" *Jackson v. State*, 544 A.2d 291, 298 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989) (quoting *Thiboutot*, 405 A.2d at 237, and other citations omitted) (ellipsis added by court and brackets altered). "The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act." App. A63 (decision below); *see Jackson*, 544 A.2d at 298-99. Under those circumstances, this court saw no reason to depart from the conclusion in *Thiboutot* that sovereign immunity also prohibited such suits in state court. *Jackson*, 544 A.2d at 299.

As before, the plaintiffs' only response is to claim that Congress had not clearly expressed its intent to abrogate State sovereign immunity when it enacted the Rehabilitation Act. *See* Appellants' Brief at 27. This is unavailing once again since no one questioned the power of Congress to abrogate State sovereign immunity under the Rehabilitation Act, which was passed pursuant to section 5 of the fourteenth amendment. The plaintiffs consistently miss the point that this court has traditionally relied upon eleventh amendment jurisprudence to determine that, in cases in which Maine is immune from suit in federal court, Maine should also be immune from suit in state court.

This court recently revisited this issue in *Moody v. Commissioner, Department of Human Services*, 661 A.2d 156 (Me. 1995). This court again held that retroactive

monetary relief under federal law was barred by sovereign immunity in state court. After noting that a federal court had held the exact same relief sought by the plaintiffs in a companion case was prohibited by the eleventh amendment, *see id.* at 157 n.1 (citing *Doucette v. Ives*, 947 F.2d 21 (1st Cir. 1991)), this court made clear that relief which is prohibited in federal court by the eleventh amendment is also prohibited by sovereign immunity in state court:

> The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.

Moody, 661 A.2d at 158 n.3 (citing *Thiboutot*, 405 A.2d at 236-37; *Drake v. Smith*, 390 A.2d 541 (Me. 1978)).

The plaintiffs do not attempt to distinguish *Moody*, arguing only that it "in no way expands or modifies the substance of the Maine common-law immunity doctrine in effect at the time of *Drake* and *Thiboutot*." Appellants' Brief at 28-29 (footnote omitted). We agree that *Moody* did not expand or modify Maine's sovereign immunity—on the contrary, it merely reaffirmed the conclusion that Maine is immune from a damages action in state court if it is also immune from such an action in federal court. In sum,

> [t]hese four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either.

App. A64 (decision below).

We note that the law from state courts elsewhere confirms this conclusion. In several cases decided prior to *Seminole Tribe*, courts confronted the issue whether plaintiffs, who were prohibited by the eleventh amendment from seeking monetary relief in federal court, were also prohibited by sovereign immunity from seeking monetary relief in state court. Surveying the caselaw, the Massachusetts Supreme Judicial Court (whose decisions this court frequently finds persuasive, *see, e.g., Bell v. Wells*, 557 A.2d 168, 175 (Me. 1989); *State v. Knowles*, 371 A.2d 624, 628 (Me. 1977)) noted that state courts have almost always concluded that plaintiffs who are prohibited by the eleventh amendment from seeking relief in federal court, are also prohibited by State sovereign immunity from seeking such relief in state court. *See Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 185-86, 565 N.E.2d 422, 427 (1991) (collecting cases).

As the Massachusetts Supreme Judicial Court demonstrated, the history and purpose of the eleventh amendment can only be effectuated if the court concludes that private damages actions are forbidden in both state and federal courts. After discussing the history of eleventh amendment jurisprudence, the court explained why sovereign immunity applies with equal force in state and federal court:

> The only logical interpretation of this implicit constitutional principle [that States would retain their sovereign immunity] is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in Federal court or it will be unwillingly subjected to process in its own courts. We think that the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.

> Although concerns for Federal-State comity—the unseemly notion of one sovereign being hauled into the courts of another—arise in many Eleventh Amendment cases, those federalism concerns are no less present in this type of case. Although here it is not a question of a State being hauled into the courts of another sovereign, it is a question of a State being hauled into its own courts by the *laws* of another sovereign. Moreover, those laws are alleged to require the payment of retroactive damage awards out of a State's coffers. If there is any area of State sovereignty which the Supreme Court is particularly hesitant to invade, it is State citizens' settled decisions about State budgetary allocations.

Morris v. Massachusetts Maritime Academy, 409 Mass. at 185, 565 N.E.2d at 426 (emphasis in original and citations omitted).

The plaintiffs again attempt to distinguish *Morris* on the grounds that this case concerned Congress' intention to abrogate State sovereign immunity. *See* Appellants' Brief at 29 n.14. The court below, however, observed that although the precise holding was modified by subsequent developments, the proposition "that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law[] was not disturbed." App. A65 (decision below).

State courts have previously addressed the issue whether individuals could sue for past FLSA overtime in state court when they could not sue for such overtime in federal court. In 1966, Congress expanded the coverage of the FLSA to include for the first time some public employers, and in *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court held that the FLSA could constitutionally be applied to States. However, the Court subsequently held that Congress had not abrogated the States' eleventh amendment immunity in the FLSA from private suits brought in federal court. *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973).

Although this decision was largely overturned by the Fair Labor Standards Amendments of 1974 (which, in turn, has largely been invalidated vis-à-vis States in cases such as *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997)), state courts addressed claims for past FLSA overtime during the period in the mid-1970's when such claims for past overtime could not be brought in federal court.

Based on the "logic" of the Supreme Court's decision, since the eleventh amendment barred private suits for past FLSA overtime in federal courts, Florida concluded that sovereign immunity also barred private suits for past FLSA overtime in state courts. *Weppler v. Dade County School Board*, 311 So.2d 409, 410 (Fla. App. 1975). Likewise, in a lengthy and carefully reasoned opinion, Ohio also concluded that since the eleventh amendment prohibited private actions against States in federal court, sovereign immunity likewise prohibited private actions against States in state courts. *Mossman v. Donahey*, 46 Ohio St.2d 1, 346 N.E.2d 305 (1976).

After a lengthy survey of eleventh amendment and sovereign immunity jurisprudence, *see* 346 N.E.2d at 308-15, because "the reasoning and purpose of the Eleventh Amendment applied to suits in state court[,]" App. A65 (decision below), the Ohio court concluded that "under the Eleventh Amendment * * * a state may not be sued for damages by an individual under fedeal law, without its consent, and * * * this principle applies equally to state as well as federal courts." 346 N.E.2d at 315 (ellipsis added and footnote omitted). "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution, or from the Eleventh Amendment[.]" *Id.* at 312 (quoted in App. A65 (decision below)).

Following *Seminole Tribe*, state courts have once again confronted the issue whether plaintiffs, who cannot sue States for past FLSA damages in federal court, may nevertheless sue States for past FLSA damages in state court. As the appended decisions from Arkansas, Wisconsin, and Maryland make clear, the uniform answer has been that plaintiffs cannot sue States for FLSA damages in either federal or state court.

In Arkanas, the court summarily dismissed the FLSA claim without an opinion. *Jacoby v. Arkansas Department of Education*, No. CV-96-7731 (Ark. Cir. Ct., Nov. 26, 1996). In Wisconsin, the court explained that it would be peculiar to preclude plaintiffs from filing suit under a federal statute in federal court while permitting plaintiffs to file such claims in state court:

> The *Seminole Tribe* court held that this clause fails to give Congress the constitutional authority to abrogate a state' Eleventh Amendment immunity from suit. In my opinion, it follows that the Commerce Clause also fails to give Congress the authority to abrogate Wisconsin's constitutional immunity from suit in state court. Therefore, the State may not be sued in either federal or state court under the FLSA without its consent.

German v. Wisconsin Department of Transportation, No. 96-CV-1261, slip. op. at 5 (Wis. Cir. Ct., March 11, 1997). In a footnote to this holding, the Wisconsin court observed further that:

> It would be anomalous if the "states rights" justices who authored *Seminole Tribe*, and who had vigorously dissented in [*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)], acted to uphold states' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional authority to overcome a state's own sovereign immunity under its state constitution.

German, slip op. at 5 n.5.

In Maryland, the court agreed with Wisconsin and the Main Superior Court that, following *Seminole Tribe*, plaintiffs cannot file FLSA damage actions against States in either federal or state court:

> The Court in *Seminole Tribe* speaks of the Eleventh Amendment as though it were synonymous with the common law sovereign immunity, and this court agrees with that premise. "[E]ach state is a sovereign * * * and * * * [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe*, 116 S. Ct. at 1122 (citations omitted and quotation marks omitted). Although there are other views on the subject of sovereign immunity as illustrated by the dissents in *Seminole Tribe*, it is rational for this court to continue to apply Eleventh Amendment principles to state common-law sovereign immunity.

Bunch v. Robinson, No. 97006017, slip op. at 7 (Md. Cir. Ct., Sept. 11, 1997) (brackets and ellipses in original).

Quite simply, following *Seminole Tribe*, in state court (which must actually address this issue instead of issuing gratuitous *dicta* unlike the lower federal courts discussed below), it is beyond debate that Congress does not have authority under the Commerce Clause to abrogate State sovereign immunity in state court. In short, "Congress could not, in view of the Eleventh Amendment of the United States Constitution, overrule a State's claimed sovereign immunity from suit in Federal or State courts." *Brown v. State*, 89 N.Y.2d 172, 195, 674 N.E.2d 1129, 1143, 652 N.Y.S.2d 233, 237 (1996) (citations omitted). We now turn to the plaintiffs' argument that this result is inconsistent with controlling Supreme Court decisions.

B. The Plaintiffs' FLSA Damage Claims Are Barred By Controlling Supreme Court Sovereign Immunity Decisions.

The plaintiffs contend that, under the Supremacy Clause, Maine cannot assert its sovereign immunity in state court because Congress authorized FLSA suits against States in state court. *See* Appellants' Brief at 10-21. Congress, of course, also authorized FLSA suits against states in federal court, and the plaintiffs concede *sub silentio* that following *Seminole Tribe*, that Congress lacks the power to authorize such FLSA suits in federal court. Indeed, the plaintiffs open their argument with the observation that "[t]he Supremacy Clause makes *valid* federal laws 'the supreme Law of the Land.'" Appellants' Brief at 11 (quoting Supremacy Clause) (emphasis added). The issue, then, is not the *intention* of Congress to abrogate state sovereign immunity, but rather the *power* of Congress to abrogate such immunity.

"*As long as it is acting within the powers granted it under the Constitution*, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added) (interpreting the Supremacy Clause).

> *When the federal government acts within its constitutional authority*, it is empowered to preempt state laws to the extent it believes such action to be necessary to achieve its purposes.

Wabash Valley Power Association v. Rural Electrification Administration, 988 F.2d 1480, 1485 (7th Cir. 1993) (emphasis added) (rejecting Supremacy Clause claim because of lack of authority for preemptive federal regulations.

In our "system of dual sovereignty between the States and the Federal Government[,]" *Gregory v. Ashcroft*, 501 U.S. at 457, it is important to remember that "[t]he

Constitution created a Federal Government of limited powers." *Id.*

> The States thus retain substantial authority under our constitutional system. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. * * * The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Id. at 457-58 (ellipsis added by Court) (quoting The Federalist No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)).

> It is incontestable that the Contitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. [at 457]; *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residual and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison) [(C. Rossiter ed. 1961)].

Printz v. United States, 117 S. Ct. 2365, 2376 (1997).

The plaintiffs, therefore, must demonstrate that Congress was acting within its constitutional authority when it purported to abrogate a State's sovereign immunity in state courts. The plaintiffs do not even attempt to demonstrate that Congress, acting under its Commerce Clause powers, has such constitutional authority.

In determining whether Congress has authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts, we return to *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), a case that is almost completely ignored by the plaintiffs. The *Seminole Tribe*

Court made plain that "blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.' " *Id.* at 1130 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Indeed, the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms." *Seminole Tribe*, 116 S. Ct. at 1122 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

> That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' "

Seminole Tribe, 116 S. Ct. at 1122 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961)). The Supreme Court has long relied upon the emphatic view of Alexander Hamilton, the "most nationalistic of all nationalists in his interpretation of the clauses our federal Constitution," *Printz v. United States*, 117 S. Ct. at 2375 n.9 (quotation omitted), that not only was State sovereign immunity inherent in the concept of sovereignty, but that it was unaffected by the adoption of the Constitution:

> This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961) (quoted in *Monaco v. Mississippi*, 292 U.S. at 324; *Hans v. Louisiana*, 134 U.S. at 13). Likewise, future Chief Justice Marshall argued that "[i]t is not rational to suppose that the sovereign power should be dragged before a court." 3 J. Elliott, *Debates on the Federal Constitution*, 555 (2d ed. 1863) (quoted in *Hans v. Louisiana*, 134 U.S. at 14). James Madison similarly observed that "[i]t is not in the power of individuals to call any state into court." 3 J. Elliott, *supra*, 67 (quoted in *Seminole Tribe*, 116 S. Ct. at 1130 n.12).

It is beyond dispute that at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts. "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down by courts and jurists that it is hardly necessary to be formally asserted." *Hans v. Louisiana*, 134 U.S. at 16.

Although the Supreme Court concluded in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Constitution altered this balance to permit suits against States in federal court, that decision created such a "shock of surprise" that it was immediately overruled by the eleventh amendment. *Hans v. Louisiana*, 134 U.S. at 11; *accord Seminole Tribe*, 116 S. Ct. at 1130. The eleventh amendment was designed to reaffirm the traditional notion of State sovereign immunity by eliminating the only extant exception to that immunity, *Chisholm v. Georgia*—thus, the eleventh amendment "did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits." *Seminole Tribe*, 116 S. Ct. at 1130.

This has certainly been the understanding of the eleventh amendment and State sovereign immunity for over a hundred years. "For over a century, we have

grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Id.* at 1129. "No sovereign State is liable to be sued without her consent." *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1838) (quoted in *Hans v. Louisiana*, 134 U.S. at 16).

> *It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent*, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

Cunningham v. Macon & Brunswick Railroad, 109 U.S. 446, 451 (1884) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17).

> *It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission*; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State.

Beers v. Alabama, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17, and quoted in part in *Seminole Tribe*, 116 S. Ct. at 1130); *see also Ex parte New York*, 256 U.S. 490, 497 (1921) (eleventh amendment is "but an exemplification" of the fundamental rule of sovereign immunity that "a State cannot be sued without its consent") (quoted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)).

In brief, "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Seminole Tribe*, 116 S. Ct. at 1122 (quoting *Puerto Rico*

Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)); *see also In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (quoted in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146). "Behind the words of the constitutional provisions are postulates which limit and control. * * * There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." *Monaco v. Mississippi*, 292 U.S. at 322-23 (citation and footnote omitted) (quoted in *Seminole Tribe*, 116 S. Ct. at 1129).

Applying these principles, the *Seminole Tribe* Court addressed the issue of Congress' power under the Commerce Clause:

> It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

Seminole Tribe, 116 S. Ct. at 1129.

Throughout its opinion, as in the passage quoted immediately above, the Court broadly framed the question as whether Congress had the power under the Commerce Clause "to abrogate the States' *sovereign* immunity," *id.* at 1124 (emphasis added), not the more limited question whether Congress had the power to abrogate the States' eleventh amendment immunity in federal court. *See generally, id.* at 1125-31 (discussing issue as relating to "state sovereign immunity" generally, not immunity from suit in federal court).

After surveying many of the authorities quoted above, the Court concluded that States did not surrender their

sovereign immunity in the plan of the convention when the Commerce Clause was adopted as part of the Constitution:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 116 S. Ct. at 1131 (footnote omitted).

The Court specifically addressed the argument that States could ignore applicable federal law if Congress did not have authority to abrogate state sovereign immunity:

> This argument wholly disregards other methods on ensuring compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state official in order to ensure that the official's conduct is in compliance with federal law; and *this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.*

Seminole Tribe, 116 S.Ct. at 1131 n.14 (citations omitted and emphasis added). Significantly, the Court did *not* state that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts.

None of the alternatives contemplated by the *Seminole Tribe* Court are present in this case. First, the United States Secretary of Labor has never investigated the plaintiffs' claims in this case, much less filed suit. Second, the

plaintiffs have not sought a prospective injunction against the Maine Commissioner of Corrections, as permitted under *Ex parte Young*, 203 U.S. 123 (1908), and, as noted above, could not now seek such an injunction (even if permitted under the FLSA) since Maine has been paying the plaintiffs overtime for nearly three years. *See also Mills v. Maine*, 118 F.3d 37, 51-55 (1st Cir. 1997) (rejecting similar argument in federal lawsuit). Finally, Maine has not waived its immunity to this overtime suit. *See also* 26 M.R.S.A. § 664(3)(D) (state overtime law). That should be the end of the matter.

The plaintiffs' arguments to the contrary are wholly unconvincing. *First*, the plaintiffs argue that Maine courts must entertain FLSA damage suits against the State of Maine because Congress authorized such suits. *See* Appellant's Brief at 11-14. It bears repeating that in *Seminole Tribe*, the Court made explicit that there is nothing inconsistent between a finding that Congress had authority to enact legislation which applies to States and a finding that Congress did not have authority to subject unconsenting States to damages actions under such legislation: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 116 S. Ct. at 1131 (footnote omitted).

As noted above, after the Court found that FLSA could constitutionally be applied to States, *see Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court nevertheless found that States could not be sued for damages in the face of the eleventh amendment. *See Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973). It therefore does not violate the Supremacy Clause to conclude that Congress lacks the authority to subject States to FLSA damage actions even if Congress has the authority to apply the FLSA to States.

Certainly none of the Supremacy Clause cases cited by the plaintiffs address this issue—these cases simply stand

for the unremarkable proposition that if Congress has the constitutional power to act, States cannot overrule or ignore those actions in the face of the Supremacy Clause. For example, in *Howlett v. Rose*, 496 U.S. 356 (1990) (cited in Appellants' Brief at 11, 13, 14), the issue was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." 496 U.S. at 359. The issue here is precisely the opposite—should the State have available a defense in state court that was available when the action was brought in the federal forum?

Second, the plaintiffs argue that Maine cannot discriminate against a federal cause of action, namely, an FLSA damages action. *See* Appellant's Brief at 14-21. This argument is based on the erroneous assertion that Maine law permits individuals to sue the State of Maine for overtime, *see id.* at 18-21, which, as demonstrated above, is demonstrably untrue. *See* 26 M.R.S.A. § 664(3)(D).

In considering the plaintiffs' argument, we begin with the recognition that Congress cannot simply commandeer Maine's state courts in order to enforce the FLSA against the State of Maine. *New York v. United States*, 505 U.S. 144, 161 (1992).

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Con-

> gress to regulate state governments' regulation of interstate commerce.

Id. at 166 (citations omitted (quoted in part in *Printz v. United States,* 117 S. Ct. at 2379). Thus, when a law enacted for carrying into execution the Commerce Clause violates the principle of State sovereign immunity, it is "in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz v. United States,* 117 S. Ct. at 2379 (quoting The Federalist No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)) (brackets added by Court).

Under these circumstances, the plaintiffs' reliance on *Printz v. United States,* 117 S. Ct. 2365 (1997), is puzzling. *See* Appellant's Brief at 17-18. In that case, the Court held that certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, which applied to local law enforcement officers, *violated* State sovereign immunity and were thus unconstitutional. *Printz v. United States,* 117 S. Ct. at 2384. Because the case did not involve either a State or the authorization of a damages action in state or federal court, the Supreme Court had no occasion to address the principles of State sovereign immunity exemplified in the eleventh amendment. Indeed, none of the cases cited by the plaintiffs questioned the congressional power to abrogate State sovereign immunity in state or federal court.

In fact, the *Printz* Court distinguished the cases relied upon by the plaintiffs in this appeal. For example, the Court observed that "[t]he *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law 'when *its ordinary jurisdiction* as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.'" *Id.* at 2370 (quoting *Second Employers' Liability Cases,* 223 U.S. 1, 56-57 (1912) (emphasis added) (cited in Appellant's Brief at 14-15, 17-18). Since over 20 years of decisions from this court demonstrate that Maine's ordinary jurisdiction precludes the

plaintiffs' claims, Maine is not discriminating against a federal cause of action.

Likewise, the *Printz* Court observed that "*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause[.]" *Printz v. United States,* 117 S. Ct. at 2381 (citing *Testa v. Katt,* 330 U.S. 386 (1947) (cited in Appellant's Brief at 11, 16, 17, 18). This conclusion, however, does not advance the plaintiffs' cause since federal law in the form of *Seminole Tribe* precludes their FLSA damages claim against States in either federal or state court. As the *Printz* Court explained:

> The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

Printz v. United States, 117 S. Ct. at 2379 (brackets added by Court). Stated differently, Maine is not discriminating against a federal cause of action if the cause of action cannot be brought against the State of Maine in federal court, and if, under controlling decisions from the Law Court and from the United States Supreme Court, the cause of action also cannot be brought against the State of Maine in state court.

Third, the plaintiffs argue that the eleventh amendment, by its terms, does not apply to state courts. *See* Appellant's Brief at 21-22. As the numerous authorities quoted above, culminating in *Moody* in this court and in *Seminole Tribe* in the Supreme Court, establish beyond peradventure, while the eleventh amendment does not expressly refer to state courts, courts should not read the eleventh amendment literally—the principles of State sovereign immunity, as exemplified in the eleventh amendment, apply with equal force in state court. *See, e.g.,*

Moody, 661 A.2d at 158 n.3 ("Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.") (citations omitted); *Seminole Tribe*, 116 S. Ct. at 1122 (the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms") (ellipsis added by Court and quotation omitted).

Fourth, the plaintiffs argue that *Seminole Tribe* only concerns Congress' power to abrogate State sovereign immunity in federal court. *See* Appellant's Brief at 22-23. This argument is based on a single sentence from *Seminole Tribe*, and the plaintiffs do not make any attempt to reconcile this argument with the dozens of pages of the Court's opinion excerpted above that discuss State sovereign immunity in both state and federal courts.

The plaintiffs attempt to bolster this crabbed reading of *Seminole Tribe* by relying on a handful of lower federal courts, which have suggested in passing that notwithstanding *Seminole Tribe*, individuals can still bring their FLSA suits in state court. *See* Appellant's Brief at 23 & n.10. As the court below suggested, this is, at best, gratuitous *dicta* from these lower federal courts, *see* App. A66-A67 (decision below), and it may simply be an attempt to soften the blow of dismissing the plaintiffs' federal FLSA claims by suggesting that some other court might be willing to entertain their claims.

Moreover, this gratuitous *dicta* certainly is not the product of any careful thought or research. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), *amended on petition for rehearing*, 107 F.3d 358 (6th Cir. 1997), the court did not cite *any* authority for the proposition that individuals could still bring FLSA actions in state court following *Seminole Tribe*. *See also Rehberg v. Department of Public Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996), *aff'd without opinion*, 117 F.3d 1423 (8th Cir. 1997) (relying exclusively on *Wilson-Jones* for the same proposition).

In the only other reported decision cited by the plaintiffs, *Aaron v. Kansas* 115 F.3d 813 (10th Cir. 1997), the court relied principally on a concurring opinion issued by two (now deceased) Justices. *See id.* at 817 (citing *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring in the result)). This view was not adopted by the Court in 1973, and this view certainly cannot be squared with the views of the *Seminole Tribe* Court in 1996 quoted above.

Indeed, none of the lower federal courts that have suggested individuals can still bring FLSA damage actions against States in state court have attempted to reconcile that view with the language of *Seminole Tribe* quoted above in which the Supreme Court listed the four remaining alternatives, for forcing States to comply with federal laws passed pursuant to the Commerce Clause, and pointedly excluded the possibility of filing damage actions in state court. *See Seminole Tribe*, 116 S. Ct. at 1131 n.14.

In sum, controlling decisions from the Law Court and from the United States Supreme Court converge on the same conclusion—Congress did not have authority when it enacted the Fair Labor Standards Act pursuant to the Commerce Clause to abrogate State sovereign immunity in order to permit damages actions in either federal or state court. Like the plaintiffs' federal lawsuit, the plaintiffs' state lawsuit was properly dismissed.

CONCLUSION

Based upon the foregoing, the defendant-appellee requests that this court affirm the judgment entered below.

Dated: November 21, 1997
Augusta, Maine

Respectfully submitted,

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IN THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

[Caption Omitted]

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The Fair Labor Standards Act ("FLSA") establishes federal wage and overtime standards. 29 U.S.C. § 201 *et seq.* These provisious apply to the states as employers. *See* 29 U.S.C. § 203(d); *Mills* v. *Maine,* 118 F.3d 37, 42 (1st Cir. 1997). Congress has created a private right of action under the statute and has provided that state employees may assert this cause of action in any "Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b):

The Superior Court below held that principles of state sovereign immunity barred it from considering a claim brought against the State of Maine under the FLSA. Because the court's ruling effectively invalidates an act of Congress, and because its ruling impairs a crucial enforcement mechanism for enforcing the statute, the United States respectfully files this brief as amicus curiae to urge reversal.

STATEMENT OF THE CASE

A. *Statutory Framework.*

1. *The FLSA.*

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, establishes federal minimum wage and overtime standards and provides equitable and monetary remedies for violations of the Act. These provisions apply to "employers." *See* 29 U.S.C. 206, 207. An "[e]mployer" is defined to include a "public agency," *id.* § 203 (d), which in turn is defined to include "the government of a State." *Id.* § 203(x). A covered "employee" includes, with certain exceptions not relevant here, "any individual employed by a State." *Id.* § 203(e)(2)(C).

The Act affords covered employees an express private right of action against their employers for back pay and liquidated damages, with concurrent jurisdiction in state and federal courts. It provides that an action to recover unpaid minimum wages or overtime compensation and an equal amount of liquidated damages "may be maintained against any employer (*including a public agency*) in any Federal or *State court* of competent jurisdiction by any one or more employees." 29 U.S.C. 216(b) (emphasis added).

The United States Secretary of Labor is responsible for the administration and enforcement of the minimum wage, overtime, and child labor provisions of the FLSA. *See* 29 U.S.C. §§ 204, 211, 216(c). The FLSA authorizes actions both by individual employees, like appellants in this case, and by the Secretary on their behalf. *See* 29 U.S.C. §§ 216(b)-(c), 217.

2. *Maine Wage Enforcement Statutes.*

Maine state law provides minimum wage and overtime wage standards. *See* 26 Me Rev. Stat. § 664. State employees are generally covered by the state minimum wage laws. *See* 26 Me Rev. Stat. § 663(10). State employees may bring suit in state court to enforce the state minimum wage standards and recover unpaid wages, liquidated damages (double damages), costs and fees, from their employer, the State. *See* 26 Me Rev. Stat. § 670. As a matter of state substantive law, however, the State has exempted itself from the state law requirement of paying time and a half for hours worked in excess of 40 hours per week. *See* 26 Me Rev. Stat. § 664(3)(D).

B. *Course of Proceedings and Disposition Below.*

This is an action for unpaid overtime compensation brought by a group of state probation officers against the State of Maine under Section 16(b) of the FLSA, 29 U.S.C. 216(b). Plaintiffs originally filed their complaint in the United States District Court for the District of Maine on December 21, 1992, seeking back wages and an equal amount of liquidated damages for the three years preceding that date. The district court entered judgment for plaintiffs as to liability.[1] In accordance with the court's ruling, the State has paid overtime as required by the FLSA since February 1994.

As the case was nearing final judgment, the Supreme Court issued its decision in *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114 (1996). The Court in that case held that Congress lacks power under the Commerce Clause to enact statutes that abrogate the Eleventh Amendment immunity of the states from private actions in federal court. As a result, on July 3, 1996, the federal district court dismissed the action for lack of jurisdiction. A43-A44.[2] That dismissal was later affirmed in *Mills* v. *Maine*, 118 F.3d 37 (1st Cir. 1997).

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[1] The federal district court issued two reported decisions in the predecessor case, *Mills* v. *Maine*, 839 F. Supp. 3 (D. Me. 1993) (liability), and *Mills* v. *Maine*, 853 F. Supp. 551 (D. Me. 1994) (genral damage issues).

[2] Citations to "A——" refer to the Appendix submitted to the Court with Appellants' brief.

After the district court's dismissal of their claims, plaintiffs filed the identical claims in Maine Superior Court. A1, A11-A13. The State moved for judgment on the pleadings urging that suit was barred by the statute of limitations and by state sovereign immunity. A45. The Secretary of Labor filed a brief as amicus curiate opposing the motion.

C. *The Superior Court's Decision*

The Superior Court dismissed the action on grounds of sovereign immunity. A57-A68. The court concluded that its decision was compelled by four prior decisions of this Court. See A61-A64 (discussing *Moody* v. *Commissioner, Dep't of Human Servs.*, 661 A.2d 156 (Me. 1995); *Jackson* v. *State*, 544 A.2d 291 (Me. 1988), cert. denied, 491 U.S. 904 (1989); *Thiboutot* v. *State*, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1 (1980); and *Drake* v. *Smith*, 390 A.2d 541 (Me. 1978)). In the court's view, those cases establish the broad proposition that "in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either." A64.

The Superior Court then considered whether the Maine cases are consistent with federal constitutional law. As it read *Seminole Tribe*, "[t]he Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity." A64-A65. Therefore, in the court's view, "it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity." A65

The Superior Court acknowledged that the Supremacy Clause was not discussed in the four Law Court cases, and that several federal courts, in dismissing FLSA actions

in light of *Seminole Tribe*, had suggested in dicta that state courts would remain obligated by the Supremacy Clause to provide relief in private FLSA actions. A66. It nevertheless found the Supremacy Clause argument unpersuasive because the federal legislation (the FLSA) was not "authorized." A67. In the court's view:

> Because Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent. Therefore, the Supremacy Clause does not come into play.

Ibid.

In a footnote, the court also rejected the Secretary's reliance on *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197 (1991), which held that the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, created a private right of action against states enforceable in state court even though unenforceable in federal court under the Eleventh Amendment. A65-A66 n.6. The court described *Hilton* as "a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence." *Ibid.* The court speculated that the decision was based largely on stare decisis and questioned whether it remains good law after *Seminole Tribe*. *Ibid.*

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Supremacy Clause of the United States Constitution requires a state court to enforce a federal cause of action brought by a state employee for back wages, notwithstanding the state's assertion of sovereign immunity, especially where as here the state employee may bring a state law claim for back wages in state court.

SUMMARY OF ARGUMENT

The Supreme Court has held that Congress, in making state employers subject to federal wage and overtime standards, has acted under the authority of the Commerce Clause and consistent with the Tenth Amendment. As the Supreme Court has made clear, where Congress acts within the scope of its powers and creates a federal law cause of action against a state, the federal claim may proceed in state court even when the Eleventh Amendment bars federal court jurisdiction. Neither the Eleventh Amendment, nor state law sovereign immunity, overrides a state court's duty under the Supremacy Clause to enforce federal law, as the "supreme Law of the Land." Thus, here the Superior Court was required by the Supremacy Clause to hear plaintiffs' FLSA action and to enforce the FLSA against the state, notwithstanding its assertion of state law sovereign immunity.

Moreover, although the state casts its arguments in terms of immunity from suit, the question, at bottom, is whether federal or state law will define the state employee's cause of action against the state for back wages. Both the federal government and the State of Maine have enacted wage standards applicable to state employees. Both the federal government and the State of Maine provide for a private right of action for state employees to collect back wages. Accordingly, this is not a case about whether state employees may sue the State of Maine in state court for back wages—such actions are allowed under state law. Rather, the issue is whether the state court can choose to enforce the state law wage standards, while refusing to hear the employees' claims based upon the federal wage standards. That type of discrimination against federal law is clearly precluded by the Supremacy Clause. Where Congress acts within its powers, its law is the law of the land, and it preempts any inconsistent state law. State courts are required by the Supremacy Clause to

enforce federal law, even where the state asserts a state law immunity from suit. Plainly, a state court cannot choose to give effect to state causes of action while barring those based on controlling federal law.

ARGUMENT

THE SUPREMACY CLAUSE REQUIRES A STATE COURT TO ENFORCE FEDERAL LAW, AND PROHIBITS A STATE COURT REFUSING TO HEAR BACK WAGE CLAIMS AGAINST THE STATE UNDER FEDERAL LAW, WHILE HEARING BACK WAGE CLAIMS AGAINST THE STATE UNDER STATE LAW.

Congress has enacted federal minimum wage and overtime standards applicable to state, as well as private, employers. Congress has created a federal private right of action to enforce the employee rights it has created, and has provided that claims under the FLSA may be brought in state as well as federal court.

The Superior Court cited two bases for barring plaintiffs' claim, thereby effectively invalidating an act of Congress. The court concluded, first, that state sovereign immunity barred suit. Second, that court concluded that suit was barred by the Eleventh Amendment.

Both conclusions reflect a misunderstanding of principles of federalism and the Eleventh Amendment. Nor can they be reconciled with the rulings of the federal courts in the wake of *Seminole Tribe*. These decisions have uniformly recognized that the Eleventh Amendment bars suits under the FLSA only in federal court; the federal cause of action against the state may still be asserted against the state in state court. *See, e.g., Wilson-Jones* v. *Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), *modified*, 107 F.3d 358 (6th Cir. 1997) (such a dismissal "does not permit states to avoid their legal duty to comply with the

provisions of the FLSA * * *. [S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law"); *Aaron* v. *Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("the employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law"); *Rehberg* v. *Department of Public Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996) ("Plaintiffs may still sue in state court under FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law"), *aff'd*, 117 F.3d 1423 (8th Cir. 1997) (table). *See also Raper* v. *State*, No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997) (attached as an addendum to this brief) (holding that under the Supremacy Clause a suit under the FLSA may proceed against a state in state court).

A. A State Court Must Enforce Federal Law As The Supreme Law Of The Land Notwithstanding The Assertion Of State Law Immunity From Suit.

1. *The Eleventh Amendment Does Not Apply In State Court.*

The federal government is, of course, a government of limited powers. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress cannot impose requirements on the states except as consistent with its enumerated powers and the limits on federal authority reflected in the Tenth Amendment.

Consistent with its constitutional authority, Congress extended some requirements of the FLSA to state employers and those requirements have been upheld by the Supreme Court. *See Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (sustaining application of the FLSA to states and declaring that "nothing in the overtime and minimum-wage requirements

of the FLSA * * * is destructive of state sovereignty or violative of any constitutional provision").[3]

The Eleventh Amendment, unlike the Tenth Amendment, reflects not a substantive limitation on federal power but a limitation on federal court jurisdiction. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. As reflected by its plain language, the Eleventh Amendment has no application to state court actions and restricts only the "Judicial power of the United States." The same phrase is used in Article III of the Constitution to create the federal judiciary.

The Supreme Court has repeatedly held that the Eleventh Amendment does *not* apply to actions in state courts. *See Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197, 204-205 (1991) (citation omitted) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts' "); *Will* v. *Michigan Dep't of State Police*, 491 U.S., 63-64 (1989) ("the Eleventh Amendment does not apply to state courts"); *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("no Eleventh Amendment question is presented, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States' "); *Nevada* v. *Hall*, 440 U.S. 410, 420-421 (1979).

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[3] Although the State initially raised a Tenth Amendment defense in this litigation, it later conceded that *Garcia* requires it to comply with the FLSA. *See* Defendant's Brief in Support of Its Motion for Judgment and in Opposition to Plaintiffs' Motion to Strike Affirmative Defenses at 6.

The Eleventh Amendment's limitation upon the federal judicial power "is, without question, a reflection of concern for the sovereignty of the States, but in a particular limited context." *Employees of Department of Public Health and Welfare of Missouri* v. *Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 293 (1973) (Marshall, J., concurring). "The issue is not the general immunity of the States from private suit * * * but merely the susceptibility of the States to suit before federal tribunals." *Id.* at 293-294. The Eleventh Amendment restricts the federal judicial power over the states because of "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Ibid. See also Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 239-240 n.2 (1985) (endorsing Justice Marshall's concurrence in *Employees of Department of Public Health and Welfare of Missouri*).

The Superior Court below mistakenly relied on dicta in *Seminole Tribe* to conclude that the Supreme Court had extended the Eleventh Amendment bar to suit to claims brought in state court. The Court in *Seminole Tribe* repeatedly recognized that the Eleventh Amendment pertains to the federal judicial power and to federal jurisdiction.[4] The Court also described the immunity in general terms of common law sovereign immunity. For example, the Court stated, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 116 S. Ct. at 1131. Similarly, the court quoted the statement in *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890), that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," *Seminole Tribe*, 116 S. Ct. at 1122.

[4] *See Seminole Tribe*, 116 S. Ct. at 1122 ("For over a century we have reaffirmed that *federal jurisdiction* over * * * unconsenting States 'was not contemplated by the Constitution when establishing *the judicial power of the United States*' ") (emphasis added); *id.* at 1123 (" 'Congress may abrogate the States' constitutionally secured immunity from suit *in federal court* only by making its intention unmistakably clear in the language of the statute' ") (emphasis added); *id.* at 1127 ("It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the *federal courts' jurisdiction under Article III*. The text of the Amendment . . . is clear enough on this point: *'The judicial power of the United States* shall not be construed to extend to any suit . . . .' ") (emphasis added); *id.* at 1128 ("it had seemed fundamental that Congress could not expand the *jurisdiction of the federal courts* beyond the bounds of Article III") (emphasis added); *id.* at 1131-1132 ("The Eleventh Amendment restricts the *judicial power under Article III*, and Article I cannot be used to circumvent the constitutional limitations placed upon *federal jurisdiction*") (emphasis added).

Such characterizations of the Eleventh Amendment immunity do *not* represent a change in the Court's construction of the Amendment as not "appl[icable] in state courts." *Hilton*, 502 U.S. at 204-205. Similar statements have been made in reference to the amenability of states from suit in federal court for more than a century. *See In re Ayer*, 123 U.S. 443, 502 (1887); *Hans*, 134 U.S. at 15-16; *Ex Parte New York*, 256 U.S. 490, 497-498 (1921). These general statements of the state's immunity to suit without its consent have never been construed to grant a state immunity from adhering to federal law in its *own* courts.

To the contrary, the Supreme Court has made clear that a state court must enforce federal law against a state and its officers, notwithstanding the assertion of state law immunity. As we show below, where, as here, Congress has acted within its powers to create a federal cause of action, state courts may not bar their doors to a federal law claim, particularly where, as here, the state allows similar claims based on state law to go forward.

2. Where Congress Has Properly Subjected A State To Federal Law, The Supremacy Clause Mandates That State Courts Enforce The Federal Law.

The Supremacy Clause of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2. By its terms, the Supremacy Clause speaks directly to state judges, who "shall be bound" to recognize the supremacy of federal law, like the FLSA, and to resolve any conflicts between federal and state law in favor of federal law. *See, e.g., Howlett* v. *Rose,* 496 U.S. 356, 375 (1990).[5] Thus, "State Courts must interpret and enforce faithfully the 'supreme Law of the Land' and their decisions are subject to review by

[5] The duty of state judges to apply federal law is inherent in our constitutional system of government. *See Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat) 304, 340 (1816). *See also Testa* v. *Katt,* 330 U.S. 394, 389-390 (1947). The requirement that state judges apply the supreme law of the land does not raise any question of improperly "commandeering" state officials. Under *Printz* v. *United States,* 117 S. Ct. 2365 (1997), and *New York* v. *United States,* 505 U.S. 144 (1992), Congress may not commandeer state legislatures or executive branch officials to enact or administer a federal regulatory program. In both cases, however, the Court was careful to distinguish and reaffirm the duty of state court *judges* to enforce federal law under the Supremacy Clause. See *New York,* 505 U.S. at 178-179 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"); *Printz,* 117 S. Ct. at 2381 ("state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause").

[the Supreme] Court." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 29 (1990). Even where a federal action against a state is barred from federal court by the Eleventh Amendment, the federal rights remain fully enforceable in state court, and the Supreme Court's appellate review ensures uniformity in the interpretation of federal law. *Id.* at 29-30 & n.13.

Indeed, the Superior Court's ruling here is directly contrary to the Supreme Court's ruling in *Hilton* v. *South Carolina Public Railways Commission,* 502 U.S. 197 (1991). In *Hilton,* the employee sued a state railroad in federal court under the Federal Employers' Liability Act ("FELA"). After the Supreme Court held that the Jones Act (wihch incorporates the FELA) does not abrogate the state's Eleventh Amendment immunity, the employee dismissed the federal court FELA action and refiled it in state court. The state court dismissed his action on the ground that FELA did not authorize damage actions against the states. The Supreme Court reversed and held that the FELA action could be maintained against the state *in state court.* Most of the Court's decision addressed the question of whether Congress intended the Act to be enforced against the State. Concluding that it did, the Court expressly held that the Eleventh Amendment does not bar a federal cause of action in state court where Congress explicitly intends to subject a state to suit. The Court explained that when Congress has clearly manifested its intent to subject the state to a money damage action, "the Supremacy Clause makes the statute the law in every state, *fully enforceable in state court.*" *Id.* at 207 (emphasis added).

The error of the Superior Court's ruling is underscored by the Supreme Court's analysis in *Atascadero State Hosp.* v. *Scanlon, supra,* and *Howlett* v. *Rose, supra.* In *Atascadero,* the Court held a federal Rehabilitation Act handicap discrimination claim could not be brought in federal court against a state because Congress had not abrogated

state Eleventh Amendment immunity from suit in federal court. *Atascadero,* 473 U.S. at 240-247. In dissent, Justice Brennan argued that the Court's holding would exempt states from compliance with the Rehabilitation Act. The majority squarely addressed Justice Brennan's concern and rejected it as "wholly misconceiv[ing] our federal system." *Id.* at 239-240 n.2. The Court explained *state courts* would still enforce the Act against the State, and that the Eleventh Amendment was *not* a grant of "general immunity from private suit * * *, but merely the susceptibility of the States to suit before *federal tribunals.*" *Id.* at 240 n.2 (quotation marks and citation omitted) (emphasis in original). The Court added that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Ibid. See also Chandler* v. *Dix,* 194 U.S. 590, 592 (1904) (dismissing an action from federal court based upon Eleventh Amendment immunity, but holding that the plaintiff's "rights secured by the Constitution and laws of the United States * * * could bring the case here [to the Supreme Court] by writ of error from the highest courts of the State").

In *Howlett* v. *Rose, supra,* the Supreme Court explained that a state court cannot refuse to hear a federal cause of action for money damages based upon state law sovereign immunity. The Court held that even if a school board possessed sovereign immunity from money damage actions under state law, the state court was required, by the Supremacy Clause, to hear the federal claim and enforce the federal law against the board. The Court explained, "as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage" to define the scope of sovereign immunity or "to redefine the federal cause of action." *Howlett,* 496 U.S. at 383.[6]

[6] In *Raper* v. *State,* No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997), the Iowa court held that the Supremacy Clause required the state court to hear the FLSA claim against the state employer. The *Raper* Court applied *Howlett* v. *Rose, supra,* and held that the state's claim of sovereign immunity would violate two corollaries of the Supremacy Clause: (1) a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse" (496 U.S. at 369), and (2) an excuse that is inconsistent with or violate federal law is not a valid excuse (*id.* at 371). *Raper,* slip op. at 12. The Court explained that under *Howlett* the assertion of state common law sovereign immunity is not a "valid excuse" for a state court to refrain from applying federal law. *Id.* at 13.

See also Felder v. *Casey,* 487 U.S. 131, 153 (1988) (where a state law is "designed to minimize government liability," "principles of federalism, as well as Supremacy Clause, dictate that such a state law give way to vindication of the federal right when that right is asserted in state court").

The Superior Court's ruling here cannot be reconciled with *Hilton, Atascadero,* and *Howlett.* Here, there can be no doubt that Congress intended to subject state employers to FLSA money damage actions in state court. *See* 29 U.S.C. § 203, 216(b); *Mills* v. *Maine,* 118 F.3d at 41-42. Thus, under *Hilton, Atascadero,* and *Howlett,* the Supremacy Clause makes the FLSA the prevailing law in Maine and the FLSA remains "fully enforceable in state court." *Hilton,* 502 U.S. at 207.[7]

[7] The Superior Court discounted *Hilton* in a footnote in part because it thought the decision was based largely on *stare decisis.* A65-A66 n.6. *Stare decisis* was relevant in *Hilton* only to the threshold question of whether FELA was intended to apply to state employers. Once that question was resolved, the Court squarely said that state courts must provide a remedy for violations of the federal statute, including violations by state employers. That ruling is dispositive here.

B. Under The Supremacy Clause, A State May Not Choose To Enforce Its Own Law And Bar Similar Actions Based Upon Controlling Federal Law.

In the present case, even more clearly than in any of the cases discussed above, the fundamental principles of our federal system preclude the State Court from closing its door to a claim based on federal law. Like the FLSA, Maine law provides minimum wage and overtime wage standards. See 26 Me. Rev. Stat. § 664. Maine state law permits a state employee to bring a claim in state court for back wages based on violation of state law wage standards.[8] At bottom, the present case is simply a dispute as to which substantive law may be asserted in such a suit. There can be no dispute that the Maine Superior Court would enforce Maine wage laws against the State. Yet, here it refuses to enforce federal wage and overtime standards. Such discrimination against federal law is plainly impermissible. Although Maine couches its argument in immunity terms, its fundamental position is simply that Maine law—not federal law—controls in a state employee's suit for back wages.

This is precisely the type of discrimination against federal law that the Constitution will not countenance. "[A] state court of competent jurisdiction" is required to "treat

[8] State employees are generally covered by the State minimum wage laws. *See* 26 Me. Rev. Stat. § 663(10). State employees may bring suit in State court to enforce the State minimum wage standards and to recover unpaid wages, liquidated damages (double damages), costs and fees, from their employer, the State. *See* 26 Me. Rev. Stat. § 670. As a matter of state substantive law, however, the State has exempted itself from the State law requirement of paying time and a half for hours worked in excess of 40 hours per week. *See* 26 Me. Rev. Stat. § 664(3)(D). The State is, however, subject to suit for in state court for back wages due under state law (including recovery for hours of overtime (*i.e.*, in excess of 40 hours per week) that were not compensated properly under State minimum wage standards) to a state employee. *See* 26 Me. Rev. Stat. §§ 663(10), 670.

federal law as the law of the land." *Howlett*, 496 U.S. at 372. The "Federal Constitution prohibits state courts of general jurisdiction from refusing to [enforce a federal statute] * * * solely because the suit is brought under a federal law." *Id.* at 373. In *Testa* v. *Katt*, 330 U.S. 394 (1947), the Court reversed a state court's refusal to enforce the double damage provisions of the Emergency Price Control Act based upon contrary state policies. The Supreme Court held that because Rhode Island had courts of competent jurisdiction, which heard the "same type" of claims arising under state law, the state court could not refuse to hear the federal claims and enforce the Act's double damage provision. *Id.* at 393-394. At bottom, a state court cannot deny jurisdiction on the basis that the plaintiff "is suing to enforce a federal act." *McKnett* v. *St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-234 (1934). "A state may not discriminate against rights arising under federal laws." *Ibid.* As the Supreme Court explained in *Testa* v. *Katt*, *supra*, a state may not treat federal law as emanating from a foreign sovereign. *Testa*, 330 U.S. at 389-390.

The assertion of immunity under state law does not alter the duty of a state court here to enforce federal law. As explained above, when Congress has validly defined a substantive right, a state may not discriminate against that claim or defeat that right by invoking principles of sovereign immunity. In *Howlett* v. *Rose*, *supra*, the Court held that a State could not refuse to hear the federal cause of action by relying upon state law sovereign immunity or by claiming a lack of jurisdiction due to the sovereign immunity. *Howlett*, 496 U.S. at 378-383. As long as the state has constituted a court of general jurisdiction, it must hear claims based upon valid federal law, even if the court does not typically exercise jurisdiction over claims for money damages against the defendant based upon state law sovereign immunity. *Id.* at 378-80. "The fact that a rule is denominated jurisdictional does

not provide a court an excuse to avoid the obligation to enforce federal law." *Id.* at 381.

In *Martinez* v. *California,* 444 U.S. 277, 283-284 (1980), the Court similarly rejected California's argument that its state law immunity statute barred the federal claim under Section 1983 against the state parole officer in state court. The Court explained that to afford the state immunity "controlling effect" over the federal law would violate the Supremacy Clause. *Id.* at 284 n.8. To permit state law immunity to defeat a federal act "would [improperly] transmute a basic guarantee into an illusory promise." *Ibid.*

In the FLSA, Congress, acting within the scope of its powers, has made state employers, as well as private employers, subject to minimum wage and overtime standards and has afforded the employee an action in state court for money damages. The Supremacy Clause means that the state court must treat federal law as the "Law of the Land." *Howlett,* 496 U.S. at 369. To the extent there is a substantive difference between the substantive standard for compensation of state employees under the FLSA and state law, the federal law would preempt any inconsistent state law. *See Cipollone* v. *Liggett Group, Inc.,* 505 U.S. 504, 516 (1992); *Robards* v. *Cotton Mill Assoc.,* 677 A.2d 540, 543 (Me. 1996). *Cf.* 29 U.S.C. § 218 (preserving more protective state laws). The state court must respect the federal law as authoritative, "as much as laws passed by the state legislature," *Howlett,* 496 U.S. at 380, and may not discriminate against the substantive law enacted by Congress. Indeed, "state law that conflicts with federal law is without effect." *Cipollone,* 505 U.S. at 516 (citation and internal quotation omitted).

Thus, the Superior Court's ruling here "misconceives our federal system." *Atascadero State Hosp.,* 473 U.S. at 239-240 n.2. The assertion of sovereign immunity by the State does not alter the state court's Supremacy Clause

obligations to enforce the supreme law of the land—the Constitution and federal laws duly enacted by Congress. Especially here, where a cause of action would be permitted under state law against the State for back wages, the Supremacy Clause dictates that the same action be heard in state court to enforce the applicable, and controlling, federal wage and overtime standards.[9]

Although the Superior Court cited several decisions of this Court discussing sovereign immunity (A61-A64 (discussing *Moody* v. *Commissioner, Dep't of Human Servs.,* 661 A.2d 156 (Me. 1995); *Jackson* v. *State,* 544 A.2d 291 (Me. 1988), *cert. denied,* 491 U.S. 904 (1989); *Thiboutot* v. *State,* 405 A.2d 230 (Me. 1979), *aff'd on other grounds,* 448 U.S. 1 (1980); and *Drake* v. *Smith,* 390 A.2d 541 (Me. 1978)), this Court has never subscribed to the Superior Court's view of state law sovereign immunity overriding the Supremacy Clause. None of the cases cited by the Superior Court involved the situation presented here where Congress has expressly provided a cause of action against the State and for enforcement of the federal right in state court. Rather, the cases cited by the Superior Court focused on whether, even in the absence of such congressional intent, the state would still be subject to suit in state court. As discussed by appel-

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[9] Moreover, given that Congress has lawfully provided state employees with a federal right to the payment of certain wages and to specified damages when the proper wages are not paid, it would raise a serious due process question if the state courts were to deny the employees their property interest in the federal remedy. *See McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990); *Reich* v. *Collins,* 513 U.S. 106 (1994). In both *McKesson* and *Reich,* the Court held that the Due Process Clause *requires* state courts to provide a remedy for state taxes collected in violation of the laws or the constitution of the United States. In *Reich,* the Court emphasized state courts must provide relief to the taxpayers, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding," even though the Eleventh Amendment bars tax refund suits against states in federal court. *Reich,* 513 U.S. at 109-110.

lants (*see* Appellants' Br. 25-29), this Court's decisions did not address the implications under the Supremacy Clause of upholding a state sovereign immunity defense that flatly contradicts the plain language of a federal statute subjecting a state to suit in state court. See *Moody*, 661 A.2d at 159 (Lipez, J., concurring). Nor do this Court's decisions authorize a state court to hear an action against the State based on state law, while refusing to hear the very same type of action based on federal law. Such discrimination against federal law is plainly barred by the Supremacy Clause.

CONCLUSION

The decision of the Superior Court should be reversed and the case remanded for proceedings on the merits of appellants' FLSA claims.

Respecttfully submitted,

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SUPREME JUDICIAL COURT
LAW COURT

[Caption Omitted]

APPELLEE'S BRIEF

INTRODUCTION

The United States has submitted a brief as *amicus curiae* urging this court to reverse the judgment entered below in which the Superior Court held that the sovereign immunity barred the plaintiffs' claims against the defendant-appellee, State of Maine ("Maine"). Maine submits this brief in response.

ARGUMENT

Before returning to the merits, several preliminary observations are appropriate. First, the views of the United States concerning this particular litigation are not the product of any investigation or familiarity with the facts of this matter. The United States Secretary of Labor ("Secretary") has statutory authority under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, to investigate States for alleged FLSA violations, *see* 29 U.S.C. §§ 209, 211, and the Secretary has statutory authority to sue States for alleged FLSA violations and to recover overtime wages for employees. *See* 29 U.S.C. §§ 216(c), 217. Nevertheless, the Secretary has never investigated the allegations in this case and certainly has not sued Maine for alleged FLSA violations.

Second, the views of the United States concerning the scope of the eleventh amendment and State sovereign immunity are not the product of any expertise. States cannot interpose a sovereign immunity defense against the United States. *See, e.g., West Virginia v. United States,*

479 U.S. 305, 311 (1987). Thus, the United States has had no occasion to litigate the scope of the eleventh amendment, and virtually none of the cases cited by the United States even involved the federal government. Accordingly, the views of the United States are not the product of any particular experience or expertise.

Third, the United States contends that the Superior Court's ruling "effectively invalidates an act of Congress[.]" Amicus Curiae Brief at 1. This fundamental misconception undermines the entire brief submitted by the United States. The Superior Court did not hold that the FLSA did not apply to Maine, or that the United States Secretary of Labor could not investigate or sue Maine for alleged FLSA violations—on the contrary, the Superior Court held only that individuals could not bring private FLSA actions against Maine.

Finally, all of the arguments raised by the United States were raised by the plaintiffs in the Appellants' Brief, and thus were addresed in detail in the Appellee's Brief. We briefly address the salient arguments advanced by the United States.

The United States argues that the Supremacy Clause bars Maine from asserting its sovereign immunity from FLSA damage claims asserted in Maine courts by Maine citizens. *See* Amicus Curiae Brief at 10-19. This argument founders immediately—the United States opens its argument with the acknowledgement that:

> The federal government is, of course, a government of limited powers. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Congress cannot impose requirements on the states except as consistent with its enumerated powers and the limits on federal authority reflected in the Tenth Amendment.

Amicus Curiae Brief at 10. The question, then, as the court below expressly noted, is whether Congress had

authority to abrogate State sovereign immunity for private damages actions when it enacted the FLSA pursuant to the Commerce Clause. Appendix ("App.") A67 (decision below). As the court below properly ruled, following *Seminole Tribe v. Florida,* 116 S. Ct. 1114 (1996), the answer is plainly "no."

The United States, however, does not ask the question whether Congress had authority to abrogate State sovereign immunity for private actions when it enacted the FLSA pursuant to the Commerce Clause. Instead, it asks the question whether Congress had authority to extend the provisions of the FLSA to States, which it answers "yes" based on *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) (5-4 decision rejecting tenth amendment challenge to FLSA). *See* Amicus Curiae Brief at 10-11.

As *Seminole Tribe* made plain, however, these are two separate questions. Even when Congress has authority to enact legislation that applies to States, it does not necessarily have authority to abrogate State sovereign immunity from private actions:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorizaiton of suits by private parties against unconsenting States.

Seminole Tribe, 116 S. Ct. at 1131 (footnote omitted). Thus, although Congress had authority under the Commerce Clause to enact the Indian Gambling Regulatory

Act of 1988 ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and to apply IGRA to the States, it did not have authority to authorize suits by private parties against unconsenting States. *Cf. Seminole Tribe,* 116 S. Ct. at 1126 n.10 (refusing to consider argument IGRA violated the tenth amendment). Likewise, even if Congress had authority under the Commerce Clause to apply the FLSA to States following *Garcia,* it did not have authority to authorize suits by private parties against unconsenting States following *Seminole Tribe.*

The United States does not make any serious effort to demonstrate that Congress, in fact, has authority under the Commerce Clause to authorize private FLSA actions against unconsenting States. On the contrary, the United States assiduously ignores *Seminole Tribe,* simply dismissing as "*dicta*" the Court's lengthy discussion of common law sovereign immunity. *See* Amicus Curiae Brief at 6, 13-14. We need not repeat the lengthy exegesis contained in *Seminole Tribe* which establishes beyond doubt that neither the express provisions of the Commerce Claue nor the Plan of the Convention authorizes Congress to abrogate State sovereign immunity from private actions when it enacts legislation, such as the FLSA, pursuant to the Commerce Clause. *See* Appellee's Brief at 23-30.

Indeed, like the plaintiffs, the United States does not even acknowledge the most pertinent passage in *Seminole Tribe* in which the Court necessarily rejected the central argument of the United States that, in order to coerce State compliance with federal law, abrogation of State sovereign immunity is necessary whenever Congress has authority to pass legislation that applies to States:

> This argument wholly disregards other methods on ensuring compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state official in order to ensure that the official's conduct

> is in compliance with federal law; and this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.

Seminole Tribe, 116 S. Ct. at 1131 n.14 (citations omitted). Significantly, the Court did *not state* that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts.

Thus, assuming that Congress has authority to apply the FLSA to States, the United States Secretary of Labor could have sued Maine for alleged FLSA violations seeking damages (but chose not to) because Maine cannot assert a sovereign immunity defense against the United States. *See* 29 U.S.C. § 216(c). Likewise, if Maine was allegedly continuing to violate the FLSA (which the United States concedes it is not, *see* Amicus Curiae Brief at 4), the Secretary could have sued Maine seeking an injunction. *See* 29 U.S.C. § 217. Finally, if Maine had consented to suit for FLSA violations (which the United States concedes it has not, *see* Amicus Curiae Brief at 3), the Supreme Court could review any question of federal law on a petition for a writ of certiorari. *Cf. Chandler v. Dix,* 194 U.S. 590, 591-92 (1904) (cited in Amicus Curiae Brief at 18) (noting Supreme Court could hear appeal from state court after noting the State had waived its sovereign immunity in *state* court).

The United States attempts to sidestep the holding of *Seminole Tribe* by piecing together snippets, *i.e., dicta,* from a handful of earlier cases. These isolated pasages relied upon by the United States certainly cannot trump the repeated conclusion of the *Seminole Tribe* Court that Congress does not have authority to abrogate State sovereign immunity against private actions when it enacts legislation pursuant to the Commerce Clause.

For example, the primary case relied upon by the United States is *Hilton v. South Carolina Public Railways*

Commission, 502 U.S. 197 (1991). *See* Amicus Curiae Brief at 6, 12, 16-17. In *Hilton*, the issue was not Congress' power to abrogate State sovereign immunity, but rather whether Congress intended to create a cause of action under the Federal Employees' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 against a state-owned railroad, which, in turn, could be enforced in state court. 502 U.S. at 199. The Court had previously assumed that Congress *did* have the power under the Commerce Clause to abrogate state sovereign immunity in FELA actions. *See Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion). Following *Seminole Tribe*, this assumption is no longer true. *See also Ortega v. Portland*, 147 Or. App. 489, 936 P.2d 1037, 1039 n.4 (1997) noting that *Hilton* did not resolve the issue of Congress' power to abrogate state sovereign immunity under the Jones Act) (applying eleventh amendment principles to hold the State was immune from suit in state court); App. A66-A67 (decision below) (distinguishing *Hilton* on several ground and questioning whether *Hilton* remains good law after *Seminole Tribe*).

In *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990) (cited in Amicus Curiae Brief at 15-16), the issue was whether the eleventh amendment prohibited the Supreme Court from reviewing a question of federal law on a writ of certiorari from state court. As *Seminole Tribe* made clear, the Supreme Court can review on certiorari questions of federal law if—and only if—the State consents to suit in state court, even if Congress lacks the authority to abrogate State sovereign immunity from private actions against unconsenting States. *See Seminole Tribe*, 116 S. Ct. at 1131 n.14.

The United States also relies heavily on *dicta* in a single footnote in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 n.2 (1985) (cited in Amicus Curiae Brief at 12-13, 16-18, 22-23), which in turn, quotes a passing

observation contained in an opinion concurring in the judgment issued by two (now deceased) Justices. *See Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring in the result)). The United States does not—and cannot—make any attempt to reconcile this isolated 20-year-old comment with the directly contrary views of the majority in *Seminole Tribe* in 1996 quoted above. *See Seminole Tribe*, 116 S. Ct. at 1131 n.14.

Finally, the United States relies upon *Howlett v. Rose*, 496 U.S. 356 (1990). *See* Amicus Curiae Brief at 15, 18-19, 22. As explained previously, this case is easily distinguished and merely stands for the proposition that *if* Congress has the constitutional power to act, States cannot overrule or ignore those actions in the face of the Supremacy Clause. *See* Appellee' Brief at 31. None of the cases cited by the United States answer the question whether Congress has constitutional power to act to abrogate State sovereign immunity under the FLSA.*

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* The lower court decisions cited by the United States are inapposite and centainly cannot overrule *Seminole Tribe*. First, as explained previously, the drive-by comments in a handful of recent federal court decisions quoted by the United States, *see* Amicus Curiae Brief at 9, are gratuitous *dicta*, are probably not the product of any briefing, and certainly are not the product of any discussion (much less, extensive analysis) of *Seminole Tribe*. *See* Appellee's Brief at 35-36. Second, the only state court decision that has held, following *Seminole Tribe*, individuals can sue unconsenting States in state court is readily distinguished. *See* Amicus Curiae Brief at 10, 18-19 (citing *Raper v. Iowa*, No. CL 68918 (Iowa Dist. Ct., Oct. 23, 1997)). The *Raper* court concluded that because Iowa lacked any constitutional provision concernng sovereign immunity, and because "Iowa Supreme Court precedent is substantially more limited than that of the Maine court, this Court concludes after extensive research and contemplation that the state sovereign immunity doctrine in Iowa is not applicable to this case." *Raper*, slip op. at 7. As the *Raper* court recognized, the law is quite different in Maine.

Notwithstanding the herculean efforts of the United States to elevate isolated comments from a handful of earlier Supreme Court cases into "rulings," "analysis," and the like, *see, e.g.*, Amicus Curiae Brief at 7, 9, 14-16, only *Seminole Tribe* answers the precise question presented by this case—did Congress have authority to abrogate State sovereign immunity when it passed the FLSA pursuant to the Commerce Clause? The inescapable conclusion of *Seminole Tribe* is that even when Congress has "complete lawmaking authority" to pass legislation under the Commerce Clause, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe,* 116 S. Ct. at 1131 (footnote omitted); *see generally id.* at 1125-31 (discussing issue as relating to "state sovereign immunity" generally, not simply immunity from suit in federal court).

The final argument of the United States is that Maine is somehow discriminating against a federal cause of action, which is likewise prohibited by the Supremacy Clause, because the Maine Legislature has passed some state wage laws, includng a state overtime provision. *See* Amicus Curiae Brief at 20-25. This argument was also raised by the plaintiffs for the first time on appeal to this court, and fails for the same reasons the plaintiffs' argument falls short. *See* Appellee's Brief at 7-9.

First, this argument was not raised below, and thus cannot be raised for the first time on appeal. Second, Maine is not discriminating against overtime claims since it has not waived its sovereign immunity for such claims under either federal or state law. *See* 26 M.R.S.A. § 664 (3)(D).

On the merits, the discrimination argument advanced by the United States is even more bizarre than the similar argument advanced by the plaintiffs. Unlike the plaintiffs, the United States acknowledges that the Maine Legislature has expressly exempted the State of Maine from the

state overtime provisions. *See* Amicus Curiae Brief at 20 n.8 (citing M.R.S.A. § 664(3)(D)). The United States argues, however, that since the FLSA did not exempt States from the federal overtime provisions, "the federal law would preempt any inconsistent state law." Amicus Curiae Brief at 23 (citations omitted). It is difficult to fathom how a state statute that expressly exempts the State of Maine from private actions under the state overtime law thereby somehow constitutes consent to private actions under the federal overtime law, and simultaneously, is also invalid discrimination because it refuses to consent to private actions under either state or federal law. This nonsensical, new argument should be rejected out-of-hand,

In sum, for over 20 years, this court has held that when private parties cannot sue the State of Maine in federal court, they likewise cannot sue the State of Maine in state court. Following *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), since Congress does not have the authority to abrogate State sovereign immunity when it enacts legislation, such as the FLSA, pursuant to the Commerce Clause, there is no reason to disturb that conclusion.

CONCLUSION

Based upon the foregoing, the defendant-appellee, State of Maine, requests that this court affirm the judgment entered below.

Dated: December 8, 1997
Augusta, Maine

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[Certificate of Service Omitted]

MAINE SUPREME JUDICIAL COURT

[Caption Omitted]

APPELLANTS' REPLY BRIEF

Introduction

It is our position in this case that by reason of the Supermacy Clause of the Constitution of the United States, employees of the State of Maine can bring justiciable Fair Labor Standards Act claims against the State in the state courts of general jurisdiction and that those claims are not rendered non-justiciable by any state sovereign immunity doctrine.

In response, the State first suggests that our position rests on the proposition that the State has waived its sovereign immunity to FLSA claims and/or consented to FLSA suits, and that we failed to raise any "waiver" or "consent" point in the trial court. As we show in Part I below, this misapprehends our basic Supremacy Clause point.

And, contrary to the State suggestion that our Supremacy Clause point rests on the requirement that FLSA claims be *identical* to the state causes of action against the State that Maine courts of general jurisdiction do entertain, we show in Part II that the governing requirement is that the state causes of action and the federal causes of action be *analogous* and that this requirement is most certainly satisfied here.

Finally, the State contends that it has a *federal* constitutionally derived immunity against federal causes of action brought in the Maine courts. But as we show in Part III

below, while the State contends that the immunity derives from the Eleventh Amendment to the U.S. Constitution, the constitutional text, the relevant precedent, and logic belie that contention.

I. THE STATE ERRS IN ASSERTING THAT THE PLAINTIFFS ARE ADVANCING A NEW "WAIVER OF IMMUNITY" OR "CONSENT TO SUIT" ARGUMENT ON APPEAL

The State argues that we are advancing—and doing so for the first time on appeal—the argument that the State of Maine has waived its sovereign immunity to FLSA claims in state court and/or that the State has consented to FLSA suits, and that this Court does not entertain such new arguments. This argument wholly misconstrues our position. Stated as succinctly as we can, what we do contend is this:

First, nothing in the Maine Constitution or in the Maine common law limits the legislature's power to subject the State to private actions in the Maine courts seeking monetary remedies. And the legislature has in fact exercised its authority to enact a host of state laws which authorize state employees to bring suit against the State for damages, including wages owed. In its brief, the State does not dispute either of these essential propositions.

Second, under the Supremacy Clause of the United States Constitution, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State." *Howlett v. Rose,* 496 U.S. 356, 367 (1990), *quoting Claflin v. Houseman,* 93 U.S. 130, 136-137 (1876). For that reason, federal laws, such as the Fair Labor Standards Act, passed by Congress acting within the scope of its Article I authority, are as much a part of the law of Maine as laws

passed by the State legislature. (Here, there is no dispute regarding Congress' authority to enact the FLSA, and to apply it fully to the States, that precise authority having been held in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).)

Third, just as the laws passed by the Maine legislature suffice to subject the State to private damage actions brought by state employees, so too do laws passed by Congress. To hold otherwise, as the State urges here, would be to violate the fundamental principle, derived from the Supremacy Clause, "that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action." *F.E.R.C. v. Mississippi,* 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring and dissenting).

In consequence the U.S. Constitution requires the States to entertain in their courts claims that are premised on valid federal laws (such as the FLSA), when they entertain claims premised on state causes of action of the same general type. *Testa v. Katt,* 330 U.S. 386 (1947); *Howlett v. Rose,* 496 U.S. 356, 367 (1990). Because the Maine legislature has authorized private actions by state employees against the State that are of the same general type as Congress has authorized in the FLSA, the decision below fails to honor the court's federal constitutional obligation to entertain those federal claims.

Plainly, that is a Supremacy Clause argument, not a "waiver" or a "consent to suit" argument. To be sure, as our summary shows, the first postulate of our Supremacy Clause argument was, and is, that any immunity the State of Maine might invoke in its own courts is purely a creature of *state common law,* without federal constitutional stature and without the power to trump a valid federal law supported by the Supremacy Clause.[1] And, of

[1] Thus we asserted below that the courts of Maine do not derive from the Eleventh Amendment any categorical constitutional

course, the source and nature of the State's sovereign immunity was a subject of contention in the trial court and is here. Our opening brief in this appeal therefore begins and ends by describing in detail the true nature, and limited scope, of Maine's sovereign immunity law. See Appellant's Brief at 5-9, 24-30. By so doing, we sought to underscore that the State can claim no federal or state constitutional sovereign immunity in the Maine courts, and that the trial court's contrary ruling presents a clear case of discrimination against federal claims in violation of the Supremacy Clause. Thus our brief in this Court elaborates on the basic argument made below, but in no way alters our essential point or our bedrock reliance on the Supremacy Clause. Certainly it does not constitute the making of a new constitutional claim on appeal.[2]

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immunity from federal obligations that Congress has explicitly imposed upon the State, and that any attempt to do so judicially would fail as a matter of federal constitutional law. See App. A32-34.

[2] The cases cited by the State do not support its contrary contention. Two of these cases stand for the proposition that an appellate court will not entertain *an entirely new constitutional claim* for the first time on appeal. *See Poire v. Manchester*, 506 A.2d 1160, 1164 (Me. 1986); *Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981). Another pair of cases cited by the State stand for the proposition that a plaintiff may not raise on appeal *entirely new theories of the case*. *See Teel v. Corson*, 396 A.2d 708, 714 (Me. 1978); *Berner v. Delahanty*, 1997 U.S. App. LEXIS 30236 *12 n.8 (1st Cir. Oct. 28, 1997). For either of these two lines of cases to be controlling here, we would need to manufacture a hypothetical situation where the plaintiffs were now raising their *entire claim* based on the Supremacy Clause for the first time, thereby creating an *entirely new theory of the case* on appeal. This is obviously not the case here, where plaintiffs have always asserted a Supremacy Clause claim. Lastly, the State cites two cases which are applicable only to limited bodies of law irrelevant to the case at hand. *Morris*, for example, is a case particular to federal receivership law, holding that 12 U.S.C. § 1821 does not allow the Resolution Trust Company to raise new defenses on appeal. *Morris v. Resolution Trust Co.*, 622

II. THE SUPREMACY CLAUSE PROHIBITS DISCRIMINATON BY STATE COURTS AGAINST FEDERAL CAUSES OF ACTION THAT ARE ANALOGOUS TO JUSTICIABLE STATE CAUSES

In our opening brief, we demonstrated that under settled Supremacy Clause principles, recently reaffirmed by the Supreme Court, Maine can not close its courts' doors to federal law causes of action against the State—such as the FLSA cause of action here—where its courts entertain analogous state law claims against the State. Appellants Br. at 14-21; *see also*, U.S. Br. at 20-25. In response, the State contends that because "this argument is based on the erroneous assertion that Maine law permits individuals to sue the State of Maine for overtime," and because Maine law does not so provide, there is no discrimination between the trial court's treatment of state and federal claims. Appellee's Br. at 31-32. This response rests on a profound misreading of our argument and of Supreme Court precedent construing the Supremacy Clause to prohibit states from disfavoring federal claims brought in their courts.

Our opening brief does *not* rest on any false assertion that Maine has authorized under its own laws the precise claims for overtime pay claimed here under the FLSA. Appellants' Br. at 19 & n.7; U.S. Br. at 3. Rather our brief demonstrates that in Maine, the Maine legislature has authorized numerous causes of action that state employees may bring against the State for back wages lost through illegal acton and for wages owed and that such legislative action is not negated by any sovereign immunity doctrine. Appellants' Br. at 6-9. Given that demonstration, we relied on the clear Supreme Court precedent holding that state courts of general jurisdiction—and the

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A.2d 708, 714 (Me. 1993). And *Townsend* is likewise a case particular to the special law of jury instruction. *Townsend v. Chute Chemical Co.*, 691 A.2d 199, 203 (Me. 1997).

Maine Superior Courts are indisputably courts of general jurisdiction—cannot be closed to federal claims which are of the "same type" as claims arising under state law that would be heard in those courts. *Testa v. Katt*, 330 U.S. 386, 394 (1947).[3]

As the facts of *Testa* make clear, the prohibited discriminatory treatment does not require an identity of federal and state claims. In *Testa*, the federal law which the state disfavored was the Emergency Price Control Act, a consumer protection measure which provided a triple damage remedy for consumer goods sold in excess of mandated price ceilings. The Supreme Court held that the State could not refuse to entertain such claims, since the State permitted claims for double damages to be brought in its courts for non-payment of overtime. *Id.* Plainly, the federal and state causes of action at issue here, see Appellants' Br. at 5-9, are much closer in character to each other than those in *Testa*, and the State makes no effort to suggest otherwise.

The State also contends that the Supreme Court's recent Commerce Clause decisions undermine the *Testa* anti-discrimination principle. Appellee's Br. at 32-34. However, as we showed in our opening brief, nothing in *Printz v. United States*, 117 S. Ct. 2365 (1997), alters the basic proposition that the Supremacy Clause requires state courts to entertain federal claims analogous to claims that state courts entertain under state law. Indeed, in *Printz*, the Court expressly recognized and reaffirmed, citing *Testa* and *F.E.R.C.* that "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause ('the Judges in every state shall

[3] In *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982). Justice O'Connor described the *Testa* principle as barring discrimination "between analogous federal and state causes of action." The proposition that the State advances here—that the causes of action need be identical—has no basis in any of the Supreme Court precedents.

be bound [by federal law]')." 117 S. Ct. at 2381. (brackets in original). The Court took pains to distinguish from that obligation the "obligation" asserted in *Printz*—*viz.*, the "obligation" requiring that "state executive officers must administer federal law" *Id.* And, the latter is not remotely implicated here. *Id.*[4]

The State's final point in response, without supporting authority, is that there is no discrimination against federal claims here because the federal claim cannot be brought in federal court. Appellee's Br. at 34. But the Supremacy Clause obligation imposed on state courts to enforce federal law equally with state law is distinct from and unrelated to any Eleventh Amendment limitation on federal jurisdiction. See pp. 7-12 *infra*.

In sum, the State has failed to offer any cogent reason why the anti-discrimination principle of *Testa* does not mandate reversal of the lower court decision.

III. MAINE DOES NOT ENJOY ANY FEDERAL CONSTITUTIONAL IMMUNITY FROM SUIT IN ITS OWN COURTS ON FLSA CLAIMS

The State contends that the Eleventh Amendment expresses—or at the least recognizes—a general state sovereign immunity limit on Congress' Article I legislative authority, a limit that applies even when the Tenth Amendment limit on Congress' authority does not. From this it follows, so the State contends, that the State may interpose in its courts a state-law sovereign immunity defense to the enforcement of otherwise valid federal enact-

[4] The State's reliance on *Printz*' predecessor—*New York v. United States*, 505 U.S. 144, 161 (1992)—fares no better. Appellee's Br. at 32. *New York* did not involve the obligation of state courts to enforce federal law, but rather a federal law obligating state *legislative* action. And, the Court in upholding the challenge to that law distinguished it from the Supremacy Clause obligation of the state courts and cited *Testa* approvingly. 505 U.S. at 178.

ments, such as the FLSA, whenever the Eleventh Amendment would preclude suit on such claims against the State in federal court.

In this regard the State invokes cases, the most recent of which is *Moody v. Commissioner, Department of Human Services,* 661 A.2da 156 (Me. 1995), which the State claims establish that the Eleventh Amendment bar to suit applies in the Maine courts at least through its incorporation in state law. In our opening brief we showed that this is to greatly over read the decisions in question. Appellants' Br. at 24-29. For present purposes we stand on our earlier showing and meet the State on its ground.

The State's "Eleventh Amendment" contention is a compound of two profound errors. First, the Eleventh Amendment simply has no application to state court proceedings. And beyond that, a state court determination to adopt Eleventh Amendment rules of decision by analogy as part of the state's law of soverign immunity when a federal cause of action is brought in state court can not trump the Supremacy Clause "no discrimination against federal claims" principle.

(a) The Eleventh Amendment in terms expresses only a limitation on the "Judicial Power of the United States", U.S. Const. Amend. XI, the same phrase that defines the federal judicial power in Article III of the Constitution. The State's reliance on that Amendment here is thus belied by the text. Indeed, the State concedes this essential point, as it must. Appellee's Br. at 34.

Eschewing any "literal" reading of the text, the State asserts—without supporting Supreme Court authority—that the Eleventh Amendment limits on the federal judicial power also create, or embody, a general limit on Congress' Article I legislative power. Appellee's Br. at 34. The Supreme Court has repeatedly rejected that assertion and has repeatedly stated that the Eleventh Amendment goes to questions of federal judicial power and has no application to state court actions or to Congress' Article I power to create private causes of action enforceable in the state courts. *See, e.g. Hilton v. South Carolina Pub. Rys Comm'n,* 502 U.S. 197, 204-205 (1991) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts' "); *Will v. Michigan Department of State Police,* 491 U.S. 58, 63-64 (1989) ("the Eleventh Amendment does not apply in state courts"); *Maine v. Thiboutot,* 448 U.S. 1, 9 n.7 (1980) (same).

To be sure, the State's brief relies heavily on *Seminole Tribe.* Appellee's Br. at 24-30. But *Seminole Tribe* arose from a *federal court proceeding,* and presented *no* issue regarding the import of Eleventh Amendment immunity from suit in federal court for federal causes of action brought in state court. Thus, *Seminole Tribe* is the least likely source for a Supreme Court ruling repudiating the long settled proposition that the Eleventh Amendment does not apply in state court. And, fairly read, *Seminole Tribe* contains no such ruling.

As we emphasized in our opening brief, *Seminole Tribe* in fact repeatedly describes the Eleventh Amendment as a limit on federal judicial power, and nothing more. *E.g.,* "The Eleventh Amendment restricts the judicial power under Article II, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-1132; see also, Appellants Br. at 22-23; U.S. Br. at 13-14 & n.4. The State seeks to avoid this seemingly insurmountable barrier in two ways.

First, the State simply mischaracterizes the Court's repeated references to the issue presented—namely the scope of federal jurisdiction—and reads every reference to state sovereign immunity as standing for the proposition that there is an Eleventh Amendment immunity in both federal and state courts. Given the Court's express disclaimers and the fact that *Seminole Tribe* provided no occasion to

delve into the nature of state sovereign immunity in the state courts, this wrenches the passages in question out of context.

The Supreme Court's discussion in *Seminole Tribe* of the general principle of sovereign immunity similarly provides *no* support for the State's contention that there is an across the board immunity to private federal causes of action. The State strings together in its brief the *Seminole Tribe* Court's quotations from *Hans v. Louisiana*, 134 U.S. 1 (1890), *Monaco v. Mississippi*, 292 U.S. 313 (1934), the Federalist No. 81, and John Marshall's observations during the debates on the federal constitution, and cites these quotations as demonstrating the Eleventh Amendment insulates states from suits in their own courts. Appellee's Br. at 24-26. However, as the Supreme Court has previously observed, these authorities *address limits on federal court jurisdiction only* and *not* the nature and extent of Congress' Article I powers or the nature and extent of state sovereign immunity in the state courts:

> [The Eleventh] Amendment places explicit limits on the powers of federal courts to entertain suits against a State. The language used by the Court in cases construing these limits, like the language used during the debates on ratification of the Constitution emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all the relevant debate, concerned questions of *federal-court* jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. [*Nevada v. Hall*, 440 U.S. at 420. (Emphasis supplied).][5]

[5] In *Nevada v. Hall*, 440 U.S. at 419 n.16, the Court quoted Alexander Hamilton from Federalist No. 81: ("It is inherent in the nature of sovereignty not to be amenable to the suit on an individual without its consent). The State recites the same passage which was also quoted in *Hans v. Louisiana*, 134 U.S. at 13, and *Seminole Tribe*, 116 S. Ct. at 1122. Appellee's Br. at 25. The *Nevada* Court quoted from John Marshall in the Constituional debates: "I hope that no gentleman will think that a state will be called at the bar of the federal court . . . . The intent is to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." The State cites to related passages from Marshall's comments, also quoted in *Hans*. Appellee's Br. at 26. The *Nevada* Court also quoted from *Hans*: "The state courts have no power to entertain suits by individuals against a state without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power?": the State's brief cites related passages from *Hans*. Appellee's Br. at 26. And the *Nevada* Court quoted from *Monaco v. Mississippi*, 292 U.S.—passages recited or referenced by the State in its brief. State Br. at 25. Finally, Justice Rehnquist's dissent in *Nevada* sought to marshall much of the language that the state recites here in his unsuccessful effort to show that state sovereign immunity was part of the plan of the constitution.

Nothing in *Seminole Tribe* questions—much less repudiates—either *Neveda v. Hall's* reading of these materials or the lesson the Supreme Court has repeatedly drawn—that the Eleventh Amendment does *not* apply in state courts.

(b) Again, the State after making a brave show all but concedes that the Supreme Court law belies its reliance on the Eleventh Amendment as such, and falls back on the declaration that "the principles of state sovereign immunity, as exemplified in the eleventh amendment, apply with equal force in state court." Appellee's Br. at 34.

But this appeal to abstract "principles of state sovereign immunity" avails the State nothing here. For we know that in Maine the principle of state sovereign immunity bows to state legislative enactments creating causes of action that are justiciable in the state courts and that are analogous to FLSA causes of action. And, we know too that where Congress acts within its enumerated powers and creates a cause of action like the FLSA cause of action—which is expressly made justiciable in state courts

of general jurisdiction—the Supremacy Cause requires state courts to entertain such federal causes of action on an equal footing with analogous state causes of action.

This Supremacy Clause principle does not lose its force where a state court seeks to negate a federal cause of action against the State by applying a state sovereign immunity rule that state law makes *inapplicable* to analogous state law causes of action against the State. Stripped of its verbal veneer, such a state court ruling does not vindicate any neutral rule but is the most blatant kind of discrimination between two causes of action—causes both created by laws binding on the state. In one instance, the enacting body is the state legislature and in the other it is Congress, whose valid laws bind state courts under the Supremacy Clause. That, of course, is just the kind of discrimination against federal law that the Supremacy Clause is designed to preclude.

Not surprisingly then, the Supreme Court precedent points to the conclusion that there is no exception to Supremacy Clause principles for defenses predicated on state sovereign immunity principles. Most recently, in *Reich v. Collins*, 513 U.S. 106-109-110 (1994), for example, the Court observed that states can not deny taxpayers a remedy in their courts for federal constitutional claims for refunds of taxes unlawfully exacted or collected, notwithstanding "the sovereign immunity States traditionally enjoy in their own courts."

And in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the Court rejected the notion—on a par with that advanced here by the State—that if an action to vindicate a federal right is barred on Eleventh Amendment grounds in federal court, a State could invoke its own laws to defeat enforcement of that right in state court. "If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by

this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution." *Id.* at 226.

Crain demonstrates that the answer to the rhetorical question posed by the State in its brief—"should the State have available a defense in state court that was available when the action was brought in the federal forum?" Appellee's Br. at 31—is that such defenses are impermissible when they would serve to defeat the federal right asserted. *See, also, National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 588 (1995) (State courts cannot "refuse to award relief merely because a federal court could not grant such relief.")

The Supreme Court has, moreover, affirmed on other occasions and in a variety of contexts, the basic principle that state courts may not impose state-law derived obstacles to the enforcement of federal rights. Thus, the Court held in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) that state sovereign immunity doctrines cannot be interposed to defeat the federally derived right to just compensation for a taking of property. *See, also, Ward v. Love County*, 253 U.S. 17 (1920). And, as we suggested in our opening brief, Appellant Br. at 13 n.6, *see also* U.S. Br. at 24, n.9, it is equally the case here that the State's failure to pay the federally mandated FLSA wages owed works a prohibited deprivation of property without due process if the State may deny any remedy to its employees in its courts.[6]

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[6] Indeed, the Supreme Court's rationale and holding in such cases as *Reich v. Collins*, *General Oil v. Crain*, *First English*, and *Ward v. Love County* all attest to the inability of the State to claim immunity from a state court suit brought to vindicate a federal right even when the state rule that is invoked does not "discriminate" aganst the federal cause of action. The supremacy of federal law that is mandated by the Constitution, in other words, is an independent obligation on the States that lies at the heart of our federal union.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the judgment of the Superior Court must be set aside.

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